THE SUPREME COURT OF OHIO, 1969 TERM†

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The increasing case-load experienced by all Ohio Courts,[1] aroused public scrutiny of the quality of justice available, more critical review of the decisions of courts by legislatures[2] and the Supreme Court of the United States, pressures for more effective law enforcement,[3] modernization of the Ohio judicial structure and, in that connection, expanded authority of the Supreme Court of Ohio[4] all suggest a need for an examination of the jurisprudence of that Court. As litigation multiplies, so do the demands on the appellate levels.[5] An appreciation of these demands, the responses of the Court and its role as head of the third branch of government may be attempted in this analysis of the 1969 term.

What follows is an effort in section I to identify some of those collective attitudes, revealed in the decisions of the term, which invariably affect the tenor of a court. The case highlights are examined in section II in practical subject categories. And what is intended to be an informative,

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† For the purpose of this article the 1969 term is considered to be the period from September 1, 1968 through August 31, 1969, which is a de facto term of the Court due to the customarily prolonged summer recess. The Court normally commences hearing cases approximately September 15, and the last merit arguments are usually concluded prior to May 15; motions may be heard into June, and most decisions are reported by the end of July.

An official term extends from January 1 through December 31 of a calendar year, and the statistics computed by the clerk's office, as well as the revised system of assigning Supreme Court case numbers, are maintained on this basis.

The official term is an historical anomaly, and the only current justification is that it corresponds to the elective terms of the justices, which commence on January 1 or 2 immediately following an election. This is not considered a sufficient reason to overlook the reality of a sustained period of decision-making which is periodically interrupted by considerably shorter breaks than the summer recess.

It has been suggested by at least one member of the Court that all recesses should be of approximately the same duration and be evenly spaced over the entire year. There is no present indication that this proposal will be adopted.

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[1] Total cases filed in Ohio Courts of Common Pleas in 1958 was 93,702; in 1968, 117,728.

[2] Witness the legislative response to State v. Potts, 16 Ohio St. 2d 111, 243 N.E.2d 91 (1968); State, *ex rel.* Park Inv. Co., v. Bd. of Tax Appeals, 16 Ohio St.2d 85, 242 N.E.2d 887 (1968); and Canton v. Imperial Bowling Lanes, 16 Ohio St.2d 47, 242 N.E.2d 566 (1968), and the continuing hearings before Senator Ervin's Subcommittee on Separation of Powers of the Committee on the Judiciary of the United States Senate.

[3] *E.g.*, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Kerner, Chairman 1968). *See* A Symposium: *The Challenge of Crime in a Free Society-Perspectives on the Report of the President's Crime Commission*, 43 NOTRE DAME LAW. 811 (1968). *See also* Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 (codified in scattered sections of 5, 18, 18 App., 28, 42, 47 U.S.C.A.).

[4] *See* W. Milligan and J. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811 (1968).

[5] Total merit and motion cases filed in the Supreme Court of Ohio in 1958 was 523; in 1968, 819.

as well as interesting, statistical review is presented in section III. Any one of these sections could be read independently, but even a tentative "feel" for the Court, which is the ultimate goal, requires perusal of them all.

Candor demands a confession as to what the article does not purport to discuss. Perhaps the most important legal development in Ohio since 1852[6] is the proposal of new rules of civil, criminal and appellate procedure. The proposed civil rules should be examined as a separate project, and similar analysis of the criminal rules will be warranted in the future. The administration of both the Supreme Court itself and the lower courts, now subject to supervision by the Court which will be incorporated into rules of superintendence for this purpose, is fascinating; unfortunately, this would require a considerable digression. Related to administration is the internal operation and structure of the Court, and that is mentioned only collaterally.

I. INTRODUCTION

> " . . . [H]e fancied that it was right and requisite, as well for the support of his own honor as for the service of his country, that he should make a knight-errant of himself, . . . righting every kind of wrong, and exposing himself to peril and danger from which, in the issue, he was to reap eternal renown and fame." Miguel de Cervantes.[7] The History of Don Quixote de la Mancha.

Who can doubt that the role of a Supreme Court is to right the wrongs in a judicial world? The difficulties are the recognition of the boundaries of that world, the identification of the wrongs and the choice of method of attack. Does the principal responsibility for determining error rest with a state court or the Supreme Court of the United States? When the direction of the law is recognized, how far should a court go? And along which route of review, and with what modicum of speed, does the polestar[8] of propriety lead? These questions—the state and federal functions of the Court, the scope of review and the philosophy on activism—define the quest which has distracted the Court from the contemplation of the merits adjudicated, a definite undercurrent in the stream of an otherwise typical term.

Concern with the respective roles of the state court of the highest jurisdiction and the Supreme Court of the United States is not limited to

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[6] The year of the statutory enactment of Ohio's Field Code of Civil Procedure, 51 O. Laws 57, following the amendment of the judicial article of the Ohio Constitution in 1851.

[7] Pt. 1, ch. 1, translated by John Ormsby.

[8] Borrowed from Justice Paul M. Herbert, an accomplished sailor, in Henry v. Central Nat'l Bank, 16 Ohio St. 2d 16, 242 N.E.2d 342 (1968).

Ohio.[9] But it has been a puzzle which has particularly perplexed the Supreme Court of Ohio in recent years since *Mapp v. Ohio*.[10]

The running debate was continued early in the term with the decision of *Hunter v. Erickson*[11] reversing the Supreme Court of Ohio's decision of the last term.[12] Chief Justice Taft's opinion clearly demonstrated an awareness of the U.S. Supreme Court's previous decision in *Reitman v.*

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[9] Particularly relevant is the concurring opinion of Finley, C. J., of the Supreme Court of Washington in State v. Davis, 73 Wash. 2d 281, 299, 301-02, 438 P.2d 185 (1969):

> "The decision of the court in *Miranda v. Arizona* . . . is the law of the land. It is, or should be, a truism of absolute quality that state court judges, and others, are duty-bound to uphold and apply the law as construed by the court. Even so, in my judgment some comment is appropriate relative to what I believe are some disturbing jurisprudential and societal ramifications and consequences of *Miranda*. For although I must and do support the decision judicially, I disagree with it, at least philosophically or in an essentially academic sense.
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> "As state law is affected more and more by a seemingly ever-expanding interpretation and application of the federal constitution, some may tend to forget the legal niceties upon which intervention of the United States Supreme Court is predicated in matters of state criminal law administration. The usual theoretical legal basis, as in *Miranda*, for applying the principles of some of the federal constitutional amendments to the states is the 'due process' clause of the Fourteenth Amendment. The *Miranda* rules are made applicable to the states because of a composite, majority judgment of the members of the Supreme Court that such rules must be applied to accord 'due process of law' for individuals accused of crimes.
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> "However, there is nothing thaumaturgic about the term 'due process of law.' Its substance does not spring from timeless oracles. Rather, the words 'due process of law' are (to paraphrase a general philosophical observation of Mr. Justice Holmes) merely the 'skin of ideas.' In very large measure due process of law, in my considered opinion, represents personal value-judgments made by different jurists at different times under different circumstances. According reasonable and rational validity to the foregoing postulates, there should be no inference of contumacy or heresy in critically analyzing and evaluating any and all judicial declarations which ostensibly or purportedly provide additional substance to the shifting and varying content of those fundamental social values characterized by the court as 'due process of law.'"

The Supreme Court of the United States (or at least some of that Court's members) has not been without reservations about the role of review. In a dissenting opinion of this term Justice Harlan questioned how, in the light of new Court innovations, ". . . the integrity of the federal judicial process is to be maintained in this era of increasingly rapid constitutional change." Desist v. United States, — U.S. —, 89 S. Ct. 1030 (1969).

The lower federal courts have also voiced confusion and disagreement in following the Supreme Court and interpreting its theory of federal-state judicial relationships. In a Second Circuit decision of this term, with all nine judges sitting *en banc*, Chief Judge Lumbard said in dissent, with two judges concurring: "I wish to be counted among those who do not think federal judges were ever meant to review every state criminal proceedings or that there is any basis for supposing that they can reach a more just result than the state court judges. We would be well advised not to arrogate so much ultimate power to ourselves, as has been done by federal decisions the past six years, in the name of safeguarding constitutional rights, and to be chary of exercising such power except in the most compelling circumstances. We have gone far enough already; we should not take the further step which will lead to the review, in one guise or another, of every plea entered in a state court." United States *ex rel.* Ross v. McMann, 409 F.2d 1016, 1036 (2d Cir. 1969). In the same case Judge Kaufman replied in a bitter majority concurrence: "Judges must be careful lest their personal predilections lead them to ignore the constitutional requirements set forth by the Supreme Court, by indulging in sophistic games of distinction-making because they do not approve of the Court's Constitutional determinations." 409 F.2d at 1026.

[10] 367 U.S. 643 (1961).

[11] 393 U.S. 385 (1969).

[12] State *ex rel.* Hunter v. Erickson, 12 Ohio St. 2d 116, 223 N.E.2d 129 (1967).

Mulkey[13] and made an honest attempt at valid distinction. But the opinion of Justice White paid barely passing respect to the state courts and decided the issue in broad terms, with little regard for legal niceties. The rule became solely a test of practicality: When an ordinance of a city expressly places all persons in an identical position as to the creation of future racial regulations this will be invalid as discriminatory if the effect is to make it more difficult than otherwise to pass open housing legislation. The importance of this case is that slight respect was shown by the Supreme Court of the United States to the state court's legal reasoning, while the quality of the opinion in reversing hardly merited great respect in turn.

The Supreme Court of the United States remanded three cases this term for consideration in the light of other decisions. It is always a vexing problem for a court to understand its function upon remand, and this is especially troublesome to a court which is accustomed to a position of last resort. The Supreme Court of Ohio demonstrated on several occasions this term its recognition of the difficulty within the state system.[14] There is at least a hint of hesitation in the cases which it in turn had to review upon direction of the Supreme Court of the United States. The latter court has left the meaning of remand ambiguous—is it directing a state court to anticipate its judgment, or is it requesting the benefit of the state's wisdom and policy? This ambiguity is outstanding in the *Serbian Church case*,[15] remanded this spring but held for argument until next term. The mandate of the Supreme Court of the United States refers to its decision in the *Presbyterian Church case*,[16] but as is pointed out later this may prove of little guidance.[17]

Following the decision in *Witherspoon v. Illinois*[18] the case of *State v. Pruett*[19] was remanded to the Ohio Court.[20] In that case and two others[21] this term the Court was squarely faced with the "Witherspoon issue"—whether veniremen in Ohio trial courts were dismissed for cause due to objections to capital punishment which would not necessarily preclude their joining in a verdict of death where the evidence warranted

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[13] 387 U.S. 369 (1967).

[14] *See* text accompanying note 111 *infra*; *see also In re* Agler, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969).

[15] Serbian Orthodox Church Congregation of St. Demetrius of Akron, Ohio v. Vladislav Kelemen, 393 U.S. 527 (*per curiam*) (1969).

[16] Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

[17] *See*, section II(I), *infra.*

[18] 391 U.S. 510 (1968).

[19] Case number 41163, dismissed by the Court December 20, 1967.

[20] Pruett v. Ohio, 392 U.S. 647 (1968).

[21] State v. Wigglesworth, 18 Ohio St. 2d 171, 248 N.E.2d 607 (1969); State v. Crampton, 18 Ohio St. 2d 182, 248 N.E.2d 614 (1969). *See also* State v. Eaton, 19 Ohio St. 2d 145, 249 N.E.2d 897 (1969).

it.[22] In these cases it is hard to avoid the impression that the Court felt forced to devote as much attention to the structure of its decision for purposes of the inevitable review as it did to the merits of the contentions.[23]

The Supreme Court of the United States also remanded the much-publicized case of *In re Whittington*[24] for consideration in the light of *In re Gault*.[25] The Supreme Court of Ohio had denied a motion to certify that case last term, and upon remand it referred it back to the Court of Appeals. But the fact was emphasized that Ohio's juvenile court system was under scrutiny. Again in the decision of *In re Agler*[26] the Court was forced painstakingly to justify its construction of *Gault*, as well as its interpretation of public policy, with a view to the U. S. Supreme Court's reaction.[27]

Despite the dissenting views of some members of the Court, *Agler* demonstrated a resistance to even implied pressure. It should go without saying that the Court's reading of *Gault* was the honest view of strict constructionists.[28] But the reluctance of the Court at this time to overhaul the juvenile court system forced it into an otherwise unnecessary defense, one which may have the effect of entrenching opposition to minor reforms.

This attitude may be compared to that in the obscenity area. The history of Ohio's decisions is traced hereinafter,[29] and a review of those cases will demonstrate that Ohio was allowed to independently develop its doctrine of obscenity in relation to the state statute. While each opinion pays lip service to U. S. Supreme Court cases, these did not dominate Ohio law. In fact, the Supreme Court of Ohio was never reversed on an obscenity issue. And by this term Ohio, in marked contrast to other states, had narrowed the application of its statute to constitutionally unimpeachable limits.

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[22] *See* section II(B) *infra*, for discussion.

[23] The decision in *Pruett* could have been soundly grounded on footnote 2 of that case alone. The Court was obviously hesitant to rely on that position, though, and possibly with reason following its experience of several years ago in *State v. O'Connor*, 6 Ohio St. 2d 169, 217 N.E.2d 685 (1966), *rev'd sub nom. O'Connor v. Ohio*, 385 U.S. 92, (1966).

[24] 391 U.S. 341 (1968).

[25] 387 U.S. 1 (1967).

[26] 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969).

[27] *See* section II(A), *infra*, for discussion.

[28] Lower court disputes as to the appropriate attitude in construing a Supreme Court opinion with which they disagree are mirrored in the Court's own membership. This term in *Orozco v. Texas*, 394 U.S. 324 (1969), Justice Harlan reluctantly concurred, "purely out of respect for *stare decisis*," in an extension of the *Miranda* rules. 394 U.S. at 328. Justice Stewart appended this memorandum to the dissent of Justice White: "Although there is much to be said for Mr. Justice Harlan's position, I join my Brother White in dissent. It seems to me that those of us who dissented in *Miranda v. Arizona*, 384 U.S. 436, remain free not only to express our continuing disagreement with that decision, but also to oppose any broadening of its impact." 394 U.S. at 331.

[29] *See* section II(B), *infra*.

Whether the Court has had the law imposed upon it or has developed it alone, there has persisted an uncertainty as to the nature of judicial discretion. This term the Court weathered another attack upon *stare decisis*. Only two cases were assigned for re-argument during the term.[30] Admittedly, both followed the retirement of Justice Paul Herbert and resignation of Justice Brown so the Court was reduced to five members who had participated at the original argument, but when examined more closely they disclose a divisive quality in a lack of unanimity on Court policy in changing rather than stating the law.

The syllabus in *DiGildo v. Caponi*[31] is not exceptional when read in relation to *Scheibel v. Lipton*,[32] the ultimate authority on the duty of an occupier of land to a social guest. It is the dicta in the case which catches the eye. As discussed later,[33] without it being necessary to the decision in the case, Justice Schneider expressly opens the pandora's box of the well-established rule that the host's duty to his social guest is limited to a warning of dangerous conditions on the premises unknown to and not likely to be discovered by the guest. He goes further and says that an act occurring a day before the arrival of the guest may be an act or activity within the *Scheible* rule prohibiting affirmative harm to a guest. Such an approach appears to be a conscious effort to throw Ohio law open to judicial revision.[34] The barely restrained attitude that this "activism" is proper is also displayed in the disposition of the argument urging the destruction of legal classifications of visitors to which the opinion replies "that a just measure of judicial restraint requires that this question be deferred to a later day and to another case."[35]

A case such as *DiGildo* evidences not only a Court split as to a point of law but also something more fundamental, the role of the Court and the judiciary as a whole. The varying views of the members of the Court on the issue of docket composition is noted in connection with the statis-

30 DiGildo v. Caponi, 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969); Carmelite Sisters, St. Rita's Home v. Board of Review, 18 Ohio St. 2d 41, 247 N.E.2d 477 (1969).

31 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969).

32 156 Ohio St. 308, 102 N.E.2d 453 (1951).

33 *See* section II(E), *infra*.

34 *See also* the opinion of Duncan, J., in Frankhauser v. Mansfield, 19 Ohio St. 2d 102, 249 N.E.2d 789 (1969), discussed *infra* section II(E).

35 18 Ohio St. 2d at 131. Although Ohio already goes well beyond the majority of jurisdictions in charity toward a guest-plaintiff, [*See* RESTATEMENT (SECOND) OF TORTS § 330, comment *b*(3) at 175 (1965)] textual commentators have encouraged Ohio to take the second step. 2 F. V. HARPER & F. JAMES, THE LAW OF TORTS § 2711 at 1477-48.

The *DiGildo case* is also informative in another context. Ohio has the so-called syllabus rule of the case so that an opinion is technically all dicta except those parts which state the rules of law adopted as syllabus paragraphs. This has been credited with clarifying the law. But it also has the effect of building a hornbook mentality in lawyers, divorcing the decision from the facts of the case. In *DiGildo* the split in the opinion's attitude and the formalities of the syllabus is marked, leading two members of the majority to concur in the syllabus and judgment only. This is not uncommon and perhaps has some merit in that it allows each judge to pinpoint exactly those aspects of the Court's conclusions with which he disagrees.

tical review of this term. There has never been a clear understanding of what standards the Court does or should apply in those instances where it has a choice as to which cases will be heard on the merits.[36]

In compliance with constitutional requirements motions to certify and for leave to appeal are allowed when there is a substantial constitutional question or a question "of great and general interest." The more conservative viewpoint is that these issues are presented when there is a point of undecided law which will control the decision in a case. Corollaries of that position are that, despite the rule that all errors are before the Court upon the merits, if the anticipated issue proves to be illusuory or spurious the case should be dismissed as improvidently allowed,[37] and that once a clear syllabus on a point has been written by the Court it is the responsibility of the Courts of Appeals to apply it in the future. The more "liberal" or "activist" theory of review is that the Court should simply correct error (thus leading to the allowing of motions and disposition on the merits, sometimes without oral argument, simply on the authority of a prior decision,[38] and if a case is believed to be correctly decided below it should not be heard on the merits at all despite its significance). These two theories may be observed to not only disagree as to the type of case the Court will hear but also to cause severe problems of precedent since the Court refuses to consider a lower court opinion, even in a case in which a motion to certify is overruled, as an authoritative statement of Ohio law.[39] Despite the inconsistency of these two principal philosophies of Court role, both operated during this Court term.

A third theory of choosing the proper docket for the Court to consider may be colloquially denominated the "big case." That strain of thought goes: The "bigger" the case the necessarily greater and more general interest it creates. It would have to be said that this approach also affects the Court's motion decisions. That which is unclear is how the word "big" is defined. Thus, there have been instances in which a disproportionately large verdict has seemed to catch the Court's attention,[40] others

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[36] *Cf.* Herbert, *Obtaining Certification in the Supreme Court of Ohio: Cases of Public or Great General Interest*, 18 W. RES. L. REV. 32 (1966), and Taft, *How to Get Into the Supreme Court*, 26 OHIO B. ASS'N. REP. 847 (1953).

[37] *See, e.g.*, Goughler v. Goughler, No. 68-426, dismissed on March 5, 1969, with no oral argument on the merits; *In re* Appropriation for Highway Purposes, No. 68-298, dismissed on February 11, 1969, after oral argument on the merits.

[38] *See, e.g.*, Haskins v. Liquor Control Comm., No. 68-22, reversed on authority of Dept. of Liquor Control v. Santucci, 17 Ohio St. 2d 69, 246 N.E.2d 549 (1969), with no oral argument. *Cf.* Powell v. Porter, No. 68-701, summarily reversed on authority of Wrinkle v. Trabert, Admr., 174 Ohio St. 233, 188 N.E.2d (1963), after oral argument.

[39] State v. Staten, 18 Ohio St. 2d 13, 15, 247 N.E.2d 293, 295 (1969).

[40] *See, e.g.*, Diener v. White Consolidated Industries, Inc., motion to certify allowed as case No. 68-565 on January 2, 1969, dismissed as improvidently allowed on May 14, 1969, following oral argument. This case was an appeal from a verdict for plaintiff in a wrongful death action with a judgment of $750,000, reputedly Ohio's largest tort recovery. The statutory basis justifying this approach to certiorari is section 2321.17, Revised Code, stipulating as one ground for

where the size of the parties has been notable,[41] and still others where the number of people affected has been the most outstanding feature of a case.[42]

One other area which has apparently troubled the Court in its self-definition of scope of review has been the proper function in appeals from administrative agencies. Some observations in this regard are offered in the statistical review.[43] The Court has wavered during the term. Where judicial review is vested in either the Court of Appeals or Supreme Court, at appellant's choice, the Court has indicated an unwillingness to weigh facts.[44] In other cases there has been equivocation.[45] Presumably there will have to be legislative changes in the Court's jurisdiction or a judicial re-appraisal in the near future.

The persistent questions of role recurred this term, and the Court managed to cope with them. There were no revelations of new insight or direction, at the most hints of an undefined disagreement. Fundamental disputes about the validity and motivation of Court actions, so noticeable last term in *Euclid v. Heaton*,[46] did not again erupt to that degree, despite the provocations of *State ex rel. Graves v. Brown*[47] and *State ex rel. Corrigan v. Perk*.[48] Conflicts of that sort are perhaps inevitable with an elected judiciary which is often unaware that it is operating other than apolitically; in openly political questions it is debatable whether a judge with a recognizable constituency has an obligation, or at least an excuse, to represent it.[49] The only conclusion that seems tenable at this time is

granting a new trial, "(D) Excessive damages, appearing to have been given under the influence of passion or prejudice."

[41] *See, e.g.*, Cleveland Trust Co. v. Eaton, No. 69-98, motion to certify allowed April 16, 1969.

[42] *See, e.g.*, Pallini v. Dankowski, 17 Ohio St. 2d 51, 245 N.E.2d 353 (1969). This was one of the series of cases construing Ohio's assured clear distance statute, the clarity of which is important to all drivers. *See* discussion *infra* II(F).

[43] *See*, section III, *infra*. *See also* section II(N) *infra*.

[44] For instance, appeals from the Board of Tax Appeals. *See* Ace Steel Baling, Inc., v. Porterfield, 19 Ohio St. 2d 137, 249 N.E.2d 892 (1969).

[45] *See* Erie-Lackawanna Rd. Co. v. Pub. Util. Comm'n, 18 Ohio St. 2d 112, 247 N.E.2d 736 (1969).

[46] 15 Ohio St. 2d 65, 242 N.E.2d 655 (1968).

[47] 18 Ohio St. 2d 61, 247 N.E.2d 463 (1969). *See* discussion in section II(O), *infra*.

[48] 19 Ohio St. 2d 1, 249 N.E.2d 525 (1969). *See* discussion in section II(L), *infra*.

[49] It has been suggested by some observers of the Supreme Court of the United States that even appointed judges with life terms do not ignore the wishes of the electorate entirely. The canons of Judicial Ethics recognize an exception for the candidate who must participate in politics to qualify for his office. Canon 28. This of course does not sanction open partisanship in the conduct of that judicial office. *See* Canons 14, 24, 30. Ohio has reached an awkward compromise, requiring a candidate to seek the primary nomination of a political party and then pitting the respective parties' nominees against each other in separate contests for each seat in a "non-partisan" general election (so labeled only because the candidates are not identified by party affiliation on the printed ballot). By far the preferable scheme is the so-called "Missouri plan" of appointment of a judge from a list prepared by a select non-partisan committee and submission of his name at a later election in which he runs unopposed and the electorate approves or disapproves his "record." This system is not perfect, but it is a more workable attempt to provide

that the Court is not operating with an expressed understanding of its function in the broad sense, and, as the pressure of an expanding calendar increases, substantive decisions of policy will become unavoidable.

II. HIGHLIGHTS OF THE TERM

A. *Juveniles*

Minor as Automobile Guest.—In one of the first decisions of the term, *Kemp v. Parmley*,[50] the Court reiterated its view that the Ohio guest statute[51] protects the mere giving of automobile hospitality and does not require assent or acceptance on the part of the guest who is transported.

Karen Kemp was an eight year old, standing near a highway intersection where she expected to be picked up by her regular school bus. The defendant driver, temporarily parked at a nearby gasoline service station, had previously seen the bus depart, and, in order to be helpful, stopped and offered Karen a ride to school. It was plaintiff's position that a child of Karen's age was incapable of giving affirmative consent to her status as a guest within the meaning of the statute. The Court considered this irrelevant, and referred to its 1958 decision in *Lombardo v. DeShance*,[52] a decision by then Judge Taft. The plaintiff in *Lombardo* had consumed such a quantity of alcoholic beverages before entering the defendant's car that she had become virtually unconscious. The Court stated the question before it as "whether one, who has voluntarily become intoxicated to such an extent that he can not know or understand what he is doing, may, while in that condition, become a guest within the meaning of the Ohio Guest Statute,"[53] and concluded that such a person was within the contemplation of the statute, the primary purpose of which was to protect well-meaning operators of motor vehicles. In *Kemp* the Court totally ignored the fact that the inability of the plaintiff in *Lombardo* to assent was a direct result of her voluntary intoxication, while under no circumstances could Karen Kemp have avoided her disability due to age. The obvious conclusion to be drawn is that the only way for an automobile passenger to avoid the guest statute is to either pay for the transportation or be forced into it despite active resistance.

Minor as Defendant for Service of Process.—The question of the proper method of service of summons upon a minor was presented to the Court in a curious case, an action against a sheriff for negligently and

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insulation of a judge from politics while preserving the people's opportunity to reject a man or his ideas which are offensive. The Ohio State Bar Association has repeatedly supported the introduction of this plan in Ohio.

[50] 16 Ohio St. 2d 3, 241 N.E.2d 169 (1968).

[51] OHIO REV. CODE ANN. § 4515.02 (Page 1964).

[52] 167 Ohio St. 431, 149 N.E.2d 914 (1958).

[53] *Id.* at 434, 149 N.E.2d at 917.

improperly failing to make a valid residence service.[54] The plaintiff had filed an action against a minor, and the clerk of courts had issued summonses directing the sheriff to serve copies upon the minor and his father. Defendants were vacationing at the time, and the summonses were returned, with no copies left at the defendants' residence. After the granting of a motion to dismiss, on the ground that the action was not timely commenced and that the defendants' absence on vacation did not toll the statute of limitations, this case was commenced.

The Court construed the statute pertaining to service upon a minor[55] and that relating to the manner of service in general.[56] These two statutes, when read together, indicate that the manner of service upon a minor is identical to that for an adult, the only unique feature being that the minor's parent must also be served. The Court hastened to point out that this rule "is defined by statute and is not the product of judicial construction."[57]

Juvenile Courts.—In May, 1967 the Supreme Court of the United States disturbed the complacency of the juvenile courts throughout the country with its decision of *In re Gault*.[58] Paul Gault was a 15 year old boy taken into custody by the sheriff of Gila County, Arizona, for allegedly making an obscene telephone call. The boy's parents were not notified at the time of his arrest, the petition alleging delinquency was not served on or shown to the boy or his parents, the complaining party was not present at the hearing, remarks in the nature of a confession were admitted into evidence despite the failure to warn Paul Gault of his constitutional rights or of his right to counsel, and although the same offense committed by an adult would have resulted in imprisonment for possibly two months, Paul Gault was found to be a juvenile delinquent and confined to the Arizona State Industrial School for the entire period of his remaining minority. The opinion by Justice Fortas emphasized the defects in the juvenile proceedings. ". . .[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[59]

This term the Supreme Court of Ohio was faced with a review of Ohio's juvenile system. This was the case of *In re Agler*.[60] Unfortunately, the Court construed *In re Gault* as narrowly as its literal words would permit.

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[54] Thomas v. Tehan, 16 Ohio St. 2d 25, 242 N.E.2d 559 (1968).

[55] OHIO REV. CODE ANN. § 2703.13 (Page 1954).

[56] OHIO REV. CODE ANN. § 2703.08 (Page 1954).

[57] 16 Ohio St. 2d at 27.

[58] 387 U.S. 1 (1967).

[59] *Id.* at 27-28.

[60] 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969).

The thrust of *Gault* was not just "fairness"[61] but the accuracy of the fact-finding process. When right to counsel is guaranteed,[62] in addition to other rights, the process is inherently of an adversary nature. This was pointed out by Justice Harlan[63] and recognized by the Supreme Court of Ohio.[64] If one of the parties feels prejudiced by the type of finder-of-fact, the adversary balance is initially tipped. This feeling by a defendant is always unfortunate but usually unjustified; however, both the Constitution of Ohio and the Constitution of the United States establish a fundamental right to a jury,[65] and where this is denied the apprehensions of any of the parties are based upon a guiding principle of the Anglo-American legal tradition.

In what is probably the best-written opinion of the term, the Court relates the history of the juvenile court system in Ohio. Yet some questions remain. The mere labeling of the entire structure as special and "civil" should not automatically end scrutiny of the practical functioning of juvenile justice. A reasonable man would find himself hard-pressed to deny the penal atmosphere and effect of commitment to the Ohio Youth Commission. This is an experience that any normal child would resist at least as much as would an adult a sentence in a state correctional institution. The original purpose to counsel and reform wayward juveniles, commendable at first blush, does not overcome the attitude of a youth that he is going to a jail for minors or the similar conclusion of his peers.[66]

When the constitutions of Ohio and the United States were adopted there were no juvenile courts. The offenses which now constitute delinquency were then crimes despite the defendant's minority, and the right to jury trial attached. Sending those adjudged to be delinquents to specialized penal institutions should not sanction the reduction of the safeguards of a fact-finding process which determines whether the particular juvenile committed the acts with which he is charged.[67]

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[61] *Id.* at 78, 249 N.E.2d at 813.

[62] Rule 74.2(b), proposed Ohio Rules of Civil Procedure; OHIO REV. CODE ANN. § 2151.352 (Page Supp. 1969). *See* In re Gault, note 9 *supra.*

[63] 387 U.S. at 75-76.

[64] 19 Ohio St. 2d at 79, 249 N.E.2d at 814. Nonetheless, one of the principal architects of the revised Juvenile Court Act [OHIO REV. CODE ANN. ch. 2151 (Page Supp. 1969)], which included a statutory right to counsel, said that the committee endeavored to draft the reform "without resorting to adversary and punitive procedures." Whitlatch, *Ohio's Revised Juvenile Court Act*, 42 Ohio B. Ass'n Rep. 1389 (1969).

[65] OHIO CONST. art. I, § 5 ; U.S. CONST. amend. VI.

[66] Or of society in general, as noted by the Court, 19 Ohio St. 2d at 79, 249 N.E.2d at 814. The revised Juvenile Court Act passed in June, 1969 (see note 74, *infra*) actually changes the commitment facility for a delinquent male over 16 years of age from the Ohio State Reformatory to a maximum security institution operated by the Department of Mental Hygiene & Correction. OHIO REV. CODE ANN. § 2151.355 (Page Supp. 1969).

[67] Among those jurisdictions already providing a right to trial by jury are the following: COLO. REV. STAT. § 22-8-2(1) (1963); D.C. CODE § 16-2307 (Supp. IV, 1965); KAN. GEN.

The same principles apply to the standard of proof which should be necessary to deprive anyone of his liberty through confinement. No valid reason was offered for the lower criterion (clear and convincing evidence) than that used in criminal trials (beyond a reasonable doubt). Furthermore, the latter is what a jury would expect to apply.[68] Justice Herbert's opinion virtually concedes that, since the Supreme Court of the United States has indicated juvenile proceedings are more than "civil" where preponderance of the evidence is the common test, and the Supreme Court of Ohio insists that they are less than "criminal," the standard adopted is conveniently in the middle.[69]

This reasoning does not extend to grand jury indictment. Such a procedure has never been required for all crimes by either constitution, and initiation of a criminal complaint by information is common in other jurisdictions.

Adopting procedural protections need not destroy the unique relationship of court and accused which the juvenile court system established. It is true that juveniles may benefit from that blend of "law and social work" to which the court refers.[70] This may continue at the stage where the understanding of an informed adult, the judge, enhanced by the customary reports of case workers, is most beneficial, namely the choice of

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STAT. ANN. § 38-808 (1965); MASS. GEN. LAWS ANN. ch. 119, § 56 (1958) (trial de novo in Superior Court); MICH. STAT. ANN. § 27-3178 (598.17) (1962); MONT. REV. CODE ANN. §§ 10-603, 604 (1957); NEB. REV. STAT. § 43-202 (1960); Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1967); OKLA. STAT. tit. 10, § 102 (1966); S.D. CODE § 43.0331 (1939); Doster v. State, 195 Tenn. 535, 260 S.W.2d 279 (1953) (by implication); TEXAS ANN. CIV. STAT. art. 2338.13 (Vernon Supp. 1967); W.VA. CODE ANN. ch. 49-5-6 (1961); WIS. STAT. ANN. ch. 48.25 (1957).

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), *rehearing denied*, 392 U.S. 947 (1968), the Supreme Court of the United States concluded, in an opinion by Justice White, that "because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." 391 U.S. at 149. ". . . [T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." 391 U.S. at 159. Similarly, the serious potential penalties for many juvenile offenses should in themselves indicate that the juvenile trial is criminal in nature. For example, compare the definition of a "delinquent child" under the new section 2151.02, Revised Code, with the definitions of a "juvenile traffic offender" or "unruly child" in new sections 2151.021 and 2151.022, Revised Code, respectively.

[68] The Supreme Court of the United States has held in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), and *Smith v. Hooey*, ___ U.S. ___, 21 L.Ed. 2d 607 (1969), "That, by virtue of the Fourteenth Amendment, the Sixth Amendment right to a speedy trial is enforceable against the States . . . ." ___ U.S. at ___. If that Sixth Amendment right is "one of the most basic rights preserved by our Constitution," 386 U.S. at 226, surely the ultimate "basic right" is the guarantee of jury trial itself. It is significant that in both *Klopfer* and *Hooey*, Harlan, J., rested the extension of jury trial procedures to the states upon the Due Process Clause of the Fourteenth Amendment instead of upon that Amendment's "incorporation" of the Sixth. This conclusion is a way of saying that such trial rights are a necessary requirement for fairness, and therefore those that jurors would assume to be essential.

[69] 19 Ohio St. 2d at 83, 249 N.E.2d at 816.

[70] 19 Ohio St. 2d at 73, 249 N.E.2d at 810; Whitlatch, *The Juvenile Court*, 18 W. RES. L. REV. 1239, 1246 (1967).

penalty or correction most likely to achieve the end of rehabilitation. Necessarily, this stage is subsequent to an impartial conclusion as to whether the juvenile charged has committed a wrongful act, and that determination should not be influenced by impressions of whether he is a "bad" or "good" boy in general.

One argument occasionally offered, not so much to assuage proponents of the above position as to reconcile those who harbor second thoughts about the wisdom of the Court's denial of a juvenile court jury, is that a juvenile defendant who prefers adult trial procedures may obtain these in the Court of Common Pleas. In addition to the fact that this sacrifices the valuable features of juvenile treatment merely to provide a different fact-finding approach,[71] the choice is not available to most accused delinquents. Rule 74.3 of the proposed Ohio Rules of Civil Procedure standardizes what has been the prevailing Ohio practice in transferring juvenile cases to adult courts. After a hearing on probable cause to believe that the child committed the act(s) charged and a mental and physical examination ordered by the court, the transfer for criminal prosecution may be made if all of the following are found: "(a) the child is not amenable to treatment or rehabilitation as a delinquent child, (b) the child is not committable to an institution for the mentally deficient or mentally ill, and (c) the safety or interest of the community require that the child be placed under legal restraint or discipline greater or for a longer period of time than are provided under the provisions of . . . [the juvenile statutes]." Clearly such transfer of jurisdiction is not elective on the part of the accused, and is restricted in the exercise of the juvenile court's discretion.

The Court displayed genuine legal craftmanship in its struggle to maintain *stare decisis* and the principles of its earlier decision in *Cope v. Campbell*,[72] despite the overdue exposure from the light of *Gault* and section 2151.351, Revised Code, amended in 1968. But it is hard to escape the conclusion that a piecemeal reform of juvenile courts will not satisfy the increasing public concern.[73] Perhaps the re-evaluation of juvenile courts is the proper function of the General Assembly where they originated; or it may be that the grant of constitutional power to the Court to superintend the lower courts of Ohio was an expression of the legislative attitude of the future.[74]

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[71] Transfer to an adult court terminates juvenile court jurisdiction and therefore its sentencing powers. Rule 74.3(3), proposed Ohio Rules of Civil Procedure.

[72] 175 Ohio St. 475, 196 N.E.2d 457 (1964).

[73] *See* series of articles by R. Zimmerman in The Plain Dealer (Cleveland), commencing Sept. 15 and continuing through Sept. 29, 1968, and a 15-article series by H. James in the Christian Science Monitor, commencing March 29, 1969.

[74] OHIO CONST. art. IV, § 5. *But see* Sub. H.B. No. 320, passed by House on June 24, 1969, before the announcement of the decision in *In re Agler*. That statute establishes standards for transfer to criminal courts, *before* hearing the complaint on its merits, which are similar, but not identical, to those suggested in the proposed civil rules (*see* text following note 71). It also

School Attendance, Right or Qualified Privilege?—The travails of Buddy Lynn Whittington will probably have a profound effect on Ohio juvenile law. One important side issue presented as a chapter in that saga raises the question of a student's and his parents' right to insist upon his attendance at a public school.

After an agonizing battle from the Juvenile Court of Fairfield County to the Supreme Court of the United States in the course of almost two years, the latter Court vacated the judgment of the Ohio Court of Appeals,[75] which had affirmed a finding of delinquency, and remanded the case[76] for consideration in the light of *In re Gault*.[77] In the meantime, Whittington had been bound over to the Common Pleas Court, and was indicted by the grand jury upon a charge of murder in the first degree. On June 27, 1968, following remand, the Court of Appeals ordered Whittington released upon bond in his parents' custody, despite the fact that the offense for which he was indicted was not bailable under Ohio law.

At the commencement of the 1968-1969 school year the local board of education, reacting to some anonymous public protests about the forthcoming presence of Whittington in school and as a current member of the high school varsity football team, adopted a regulation that "Any student . . . charged or convicted of a wrongful act, such as a felony, shall be excluded from attending the schools of the . . . school district until he is exonerated by the legal authorities." In reaction to that regulation, and the concomitant determination of the school board that Whittington be excluded pursuant to the regulation, Whittington and his parents filed an action in mandamus in the Court of Appeals to require the school board to admit him, "or in the alternative, that the respondents supply the minor petitioner with a tutor to enable him to continue his studies and receive full accredidation." The writ was issued ordering his attendance, despite the fact that on the same day the petition was filed the board adopted a resolution to provide Whittington with a tutor. The school board appealed, and the Supreme Court of Ohio reversed the Court of Appeals this term.[78]

The Court, in the classical tradition of side-stepping controversial disputes where a decision on the merits is not absolutely essential,[79] disposed

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confirms the clear and convincing evidence test and denies a jury trial. It continues the right to counsel. See, Whitlatch, *supra*, note 64, for section by section summary.

[75] In Re Whittington, 13 Ohio App. 2d 11, 233 N.E.2d 333 (1967).

[76] 391 U.S. 341 (1968).

[77] 387 U.S. 1 (1967).

[78] State *ex rel.* Whittington v. Barr, 19 Ohio St. 2d 21, 249 N.E.2d 773 (1969).

[79] It was said of Mr. Justice Frankfurter by two of his former law clerks: "Related to the Justice's reluctance to substitute his own judgment for that of the legislature, we find running through several of his opinions during the year [1947 term] a corresponding reluctance to resolve issues, and particularly constitutional questions, that did not have to be decided." Helman

of the case as moot in the first instance because the school board's tutoring resolution had technically complied with the alternative prayer of the petition. This decision ignored the illusory qualities of the mootness upon which it relied. The school board had repeatedly refused to provide tutoring service to Whittington over the previous two years and had, in this instance, adopted the resolution only when faced with a probable judicial rejection of their Whittington-oriented exclusion regulation.

Without a continuing court order, the board can now repeal its resolution at any time. Once this is recognized, an admission of the need and justification for a court writ raises another problem. The issuance of an extraordinary writ is within the discretion of the court, and, if the allegations of the petition justify the issuance at all, the Court of Appeals could normally exercise its discretion to grant the primary prayer as the more effective remedy for the board's illegal act. That court could easily understand that the reason for the alternative prayer was not that petitioners considered tutoring equivalent, but rather that a teenage boy who had already lost two years of education could not risk another in order to demand his full rights. It would be unusual for the Supreme Court to sustain the issuance of a writ and modify the details in order to achieve the same result as it did in this case.

It is regrettable that the Court didn't reach the fundamental question, namely the validity of a school district regulation excluding from the public schools any potential student who is "charged" with a "wrongful act," and continuing that exclusion "until he is exonerated." The substance and effect of this rule is to impose a significant punishment upon a juvenile before he has been proven guilty, and it unabashedly places the burden upon him to prove himself innocent as a condition of readmittance to school. Such a requirement blatantly denies due process of law to a student who is accused of any serious wrong.

The regulation could never be sustained as a penalty provision, but in its support arguments were offered that it was necessary for school discipline and efficiency. To this there are two responses. First, the Supreme Court of the United States has already severely limited the permissable restraints which may be imposed to avoid anything short of "material and substantial interference with school work or discipline."[80] In sustaining students' rights to peacefully and conveniently express opposition to the Vietnam war the Court said that

> . . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression . . . . In our system, state-operated schools may not be enclaves of totalitarianism. School authorities do not possess absolute authority over their students.

& Rosenthal, *Mr. Justice Frankfurter, Legal History, and Law Clerks*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER (1966).

[80] Tinker v. Community School District, 393 U.S. 503 (1969).

> Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligation to the State.[81]

Surely the right to freedom of speech is no more sacred than the presumption of innocence in favor of an accused. But second, there was no credible evidence, other than the prediction of administrators, that Whittington's attendance would interfere in the conduct of school activities, and the other evidence before the Court of Appeals showed these fears to be ingenuine, or at least fanciful. Whittington had been on bail in the small community for the entire summer without incident; neighbors testified that he socialized with their children; he had "made" the high school football team with which he had been practicing; and virtually the entire team appeared at court to testify on his behalf. These considerations persuaded the Court of Appeals but were never dealt with by the Supreme Court.[82]

B. *Criminal Law*

Obscenity.—Section 2905.34, Revised Code, provides that "no person shall knowingly sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, . . ." or other item of communication or display. Section 13035, General Code, the predecessor to the current statute, provided (prior to amendment in 1939) as follows: "Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession for such purpose, an obscene, lewd or lascivious book . . ." is guilty of a crime. In 1939 the words "for such purpose" were deleted and replaced with "or has under his control."[83] In 1943 the word "knowingly" was inserted following the word "whoever,"[84] and the statute reached the substantive form which is in effect today.

The Court first wrestled with the result of this series of changes in *State v. Mapp.*[85] In the opinion of the Court by then Judge Taft, it was stated that "in the opinion of Judges Taft, Bell, Herbert and Peck, the portion of Section 2905.34, Revised Code, upon which defendant's conviction was based, is constitutionally invalid, and, for that reason, the judgment of the Court of Appeals should be reversed. However, Section

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[81] *Id.* at 508, 511.

[82] An appeal from the decision of the Court of Appeals, upon remand from the United States Supreme Court, that a finding of delinquency is not an appealable order when the juvenile is thereafter indicted, was filed in the Supreme Court of Ohio as case no. 69-287 on May 28, 1969. It is inconceivable that the Court would refuse to certify that case as a question of great and general interest or dismiss it *sua sponte* as not involving a substantial constitutional question.

[83] 118 OHIO LAWS 420.

[84] 120 OHIO LAWS 230.

[85] 170 Ohio St. 427, 166 N.E.2d 387 (1960), *rev'd on other grounds sub nom.* Mapp v. Ohio, 367 U.S. 643 (1961).

2 of Article IV of the Constitution of Ohio reads in part: 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void.' "[86] The opinion of the majority was that criminal liability for mere possession violated the First and Fourteenth Amendments to the Constitution of the United States by discouraging the perusal of non-obscene literature. And even reading a requirement of scienter into the word "knowingly" would not avoid the consequence of over-cautiousness because of the severe punishments for a violation of the law.

On two other significant occasions the Court then had to consider this statute before the constitutional amendment of May, 1968 permitted a majority vote to control all constitutional questions. In *State v. Jacobellis*,[87] an opinion by Judge Radcliff of the Fourth District Court of Appeals sitting on assignment,[88] the Court adopted Judge Taft's suggestion in *Mapp* and construed section 2905.34, Revised Code, to require scienter as an element of "knowingly." But it went further and also read in *mens rea, i.e.*, a guilty purpose. Thus, the Court was able to say, without reaching any constitutional issue but as a matter of statutory construction, that the "section might well be held to be invalid" if the phrase "have in his possession or under his control" related "to the mere private possession by an individual of such matter for his own personal gratification."[89] And as a secondary conclusion the opinion limited the forbidden possession and control to the purpose of dissemination under the theory that a statutory phrase "must be read in context with the language used in the section as a whole."[90]

This approach in *Jacobellis* succeeded in converting Judge Bell from an advocate of constitutional invalidity to one supporting the construed statute,[91] and the conviction was affirmed although the same reading of the section would have required a reversal of the *Mapp* conviction since the evidence there only showed Mrs. Mapp discovering obscene literature among the belongings of a former tenant and storage in her basement on

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[86] *Id.*, at 433-34, 166 N.E.2d at 391.

[87] 173 Ohio St. 22, 179 N.E.2d 777 (1962), *rev'd on other grounds sub nom.* Jacobellis v. Ohio, 378 U.S. 184 (1964).

[88] Now the Administrative Director of the courts of Ohio.

[89] 173 Ohio St., at 27, 179 N.E.2d at 780.

[90] *Id.*

[91] Judge Bell's concurring opinion in State v. Wetzel, 173 Ohio St. 16, 20, 179 N.E.2d 773 (1962), decided the same day as *Jacobellis*, sheds light on his views. The line to be drawn is between obvious intent to disseminate obvious pornography and private possession of any "obscene" material. Given the desirability of such a line, a statute's constitutionality may vary with the facts; when a case is on one side of the line the statute is invalid, but for a heinous case it may be resurrected.

A similar theory of constitutional adjudication is exhibited in Justice Brown's opinion in State v. Buckley, 16 Ohio St. 2d 128, 132, 243 N.E.2d 66 (1968). *See also* Justice Schneider's opinion in Euclid v. Heaton, 15 Ohio St. 2d 65, 72, 238 N.E.2d 790 (1968).

his behalf. Judge Taft specifically refused to bastardize legislative history and re-write the statute to make it valid, but his opinion concurring in part displayed not a little eagerness to have found that approach justifiable. Judge Herbert simply dissented, and as a result his attitude on the evolution of the statutory interpretation at that point was left ambiguous.

State v. Ross[92] was decided after the changes in Court membership in January, 1965, but also before the constitutional amendment. Judge Brown, not a party to the previous decisions and therefore more prone to be candid in his discussion, explained that an indictment charging an offense in the language of section 2905.34 alone is insufficient because " . . . the language of the statute used in the indictment has been judicially limited, and this limitation is not apparent from the language itself . . . . This *mens rea* requirement was inferred . . . , and the motivation behind the inference was undoubtedly the preservation of language of otherwise questionable constitutionality."[93] Chief Justice Taft and Judge Herbert were able to concur, either because the syllabus and opinion reflected adversely upon *Jacobellis* or through a devotion to *stare decisis.* Judge Schneider, also new in 1965, concurred in the syllabus and judgment only but did not write a separate opinion.

This term the Court was again faced with the obscenity law. In a *per curiam* opinion in *State v. Potts*[94] the *Ross case* was followed, and a demurrer to an indictment charging only "unlawfully and knowingly hav[ing] in their possession or under their control" was sustained. The importance of this case is that the Modern Courts Amendment to the Ohio Constitution had been passed as Issue 3 on the ballot the previous May, and the Court had (not without just criticism) accelerated its effective date from 1970 to that election; so the Court was no longer bound by the provision which had prevented a majority declaration of unconstitutionality in *Mapp.* Nonetheless, by acquiescence of all except Herbert, the strain which had been made to apply the section around the constitutional handicaps was accepted. In fact, one very unfortunate paragraph[95] even seems to show a drift back to the application of the section without judicial gloss; the suggestion is that if a bill of exceptions could demonstrate that adequate evidence of intention to sell was introduced, then *Ross* would not apply because the defendant would not have been prejudiced. Justice Schneider was able to concur generally this time.

Justice Herbert's dissent in *Potts* is ironic. After following the course of development one would have expected him to either concur or chastise the Court for not polling itself on the old *Mapp* issue of constitu-

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[92] 12 Ohio St. 2d 37, 231 N.E.2d 299 (1967).

[93] *Id.* at 38-9, 231 N.E.2d at 300.

[94] 16 Ohio St. 2d 111, 243 N.E.2d 91 (1968).

[95] The last full paragraph of 16 Ohio St. 2d at 112.

tionality now that the opportunity was available. Instead he criticizes the following of *Ross* in which he concurred and lauds *Jacobellis* as "an able and penetrating opinion"[96] despite his earlier dissent in that case. He even describes the vote as "five judges concurred, one dissented and one concurred in part in Jacobellis,"[97] but does not identify himself as the one dissenter. The only hint of a reason for his change of view is the observation that "Ohio is apparently becoming a fertile area for the dissemination of obscene literature."[98]

By the time the Supreme Court of the United States decided *Stanley v. Georgia*[99] in April of this year it had become perfectly clear that its judgment condemning "a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter"[100] as unconstitutional was irrelevant for Ohio. Although the vulnerable part of the Georgia legislation[101] is virtually identical to section 2905.34, Revised Code, in its use of the phrase "knowingly have possession of" within a string of phrases referring to sale, exhibition and transmission, the Supreme Court of Georgia preferred not to duck the issue with statutory construction.[102] At any rate, it worked for Ohio.

Insanity, Standard and Proof.—The opinion of Chief Justice Taft in *State v. Staten*[103] reviewed the history of the defense of insanity in Ohio and dispelled many of the misconceptions which have plagued Ohio courts and lawyers.

Before this term, it had become the accepted dogma that Ohio followed the classic rule in *M'Naghten's case*.[104] That test has generally been summarized as allowing a defense of insanity only when the accused, at the time of committing the criminal act charged, was unable to distinguish between right and wrong. The Court expressly repudiated textual attributions of this "sole test" to Ohio[105] and chided the legal encyclopedias for relying upon Common Pleas and Court of Appeals decisions for Ohio authority.[106]

The Court refers to the case of *Clark v. State*[107] as establishing the defense of insanity in Ohio, in the same year as the decision of the *M'Naghten case* and independently of the English court. *Clark* incor-

96 *Id.*, at 114, 243 N.E.2d at 93.

97 *Id.*

98 *Id.* at 116, 243 N.E.2d at 95.

99 394 U.S. 557 (1969).

100 *Id.* at 559.

101 GA. CODE ANN. § 26-6301 (Supp. 1968).

102 *See* Stanley v. State, 224 Ga. 259, 161 S.E.2d 309 (1968).

103 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969).

104 4 St. Tr. N.S. 847, 8 Eng. Rep. 718 (1843).

105 18 Ohio St. 2d at 14-15, 247 N.E.2d at 295.

106 *Id.*

107 12 Ohio 483 (1843).

porated an element that went beyond the right and wrong test, namely whether the defendant could refrain from doing the act. That element is obviously a variation of the "irresistible impulse" test. The Court points out[108] that the failure to use that label in Ohio has not been a rejection on the part of the Court of the second element of insanity in the *Clark case*. Rather, it has been avoided as a misleading term since the defense need not be limited to instantaneous incidents of insanity, and the fact of momentary anger does not itself amount to insanity.

Two stylistic factors in the case deserve mention. One is the technique which the Court used in stating a suggested charge to the jury.[109] Footnote 5 accompanying the suggested charge seems clearly intended to alert the Common Pleas Judges Association to change the current model jury instruction on insanity.[110] The second noteworthy characteristic is the way in which the Court structured its conclusion on remand with specific instructions to the trial court for further disposition of the case.[111]

One valuable service which the opinion performs is its analytical approach. The Court clearly and candidly explains its understanding of insanity as a refutation of criminal responsibility and states the reasons why the medical determination does not predominate the application of legal consequences. Thus, the purposes of sanctions in the criminal law (primarily deterrence) do not completely coincide with the idea of non-penal treatment for all persons who might benefit to any degree. The only limitation which the law will recognize upon its power to punish or incarcerate in the case of one who knew the reprehensible nature and quality of his voluntary act is where that person is currently insane so that punishment would be beyond his comprehension.[112]

A frequent criticism of the *M'Naghten*-oriented test of legal insanity is that there is no scientifically reliable technique for psychiatric evaluation of the crucial elements.[113] The important factor to understand is that, just as the *M'Naghten* rule is irrelevant to modern psychiatry, psychiatric valuation is irrelevant to the ultimate factual conclusions upon which the purposes of the criminal law rely.[114] Ignorance of this point led to the adoption of the *Durham* rule.[115] The argument made to the court in that

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[108] 18 Ohio St. 2d at 21-22, n. 8, 247 N.E.2d at 299, n. 8.

[109] *Id.*, at 21, 247 N.E.2d at 299.

[110] 4 OHIO JURY INSTRUCTIONS, CRIMINAL 410.51(b) (1967). These instructions were significantly revised to approximately conform to the opinion's suggestions. 4 OHIO JURY INSTRUCTIONS, CRIMINAL 410.51(c) (1969).

[111] 18 Ohio St. 2d at 22, 247 N.E.2d at 300.

[112] State, *ex rel.* Townsend, v. Bushong, 146 Ohio St. 271, 65 N.E.2d 407 (1946). Krauter v. Maxwell, 3 Ohio St. 2d 142, 209 N.E.2d 571 (1965).

[113] COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT 26 (1954).

[114] *Cf.* Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 773-74 (1956).

[115] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

case was that the *M'Naghten* rule "compelled a psychiatrist to answer, or to decline to answer, questions which were in fact irrelevant . . . ."[116] The result is an encouragement of expert testimony in the language of the profession. The jury is supposedly still vested with the responsibility to make the ultimate factual conclusions, but in effect the psychiatric testimony will control. The jury merely weighs the reliability of competing "experts,"[117] and these expert's opinions are oriented toward the need for and amenability to custodial care[118] instead of legal purposes.[119] The adoption of the "impartial expert"[120] would not correct the fundamental diversion of responsibility but would instead lead to the equivalent of a directed verdict based upon his opinion.

Ohio confronted the use of expert testimony this term in *State v. Crampton.*[121] There, one of defendant's witnesses was a staff doctor of a state mental hospital who was assigned to care for defendant; he had had some psychiatric training but was not qualified as a psychiatrist in the state. This raised serious questions as to his qualification as an expert witness at all, but the Court did not reach that issue.

Following the decision in *Staten* the Court had no difficulty in rejecting testimony based upon the *Durham* rule. This is a tremendous temptation for the expert witness, and Ohio trial courts will have to be careful to limit such excursions into the improper. A more difficult, and more subtle problem was the sustaining of an objection to a hypothetical question propounded to the witness. The use of such questions would have the overall effect of enhancing the power of expert testimony, almost to the *Durham* level, if they could be grounded upon basic non-medical facts (which the jury would find) and express a medical conclusion of insanity in that fact situation. Most psychiatrists would be hesitant to reply to such a question, but in *Crampton* the defense counsel asked for an opinion on the mental effect of an excessive use of certain drugs which the defendant had allegedly consumed. The Court avoided the issue of whether this was a relevant question at all on the issue of in-

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116 Supplemental Brief for Appellant on Reargument.

117 "According to the Durham decision, if the defense of insanity has been raised in a criminal trial, it is considered to be a 'matter of fact' for the jury to decide whether the offender suffered from a 'mental illness' at the time of the commission of the act with which he is charged.

"This is unadulterated nonsense. It could come about only as a result of the great prestige which the medical profession commands in our present-day society, and is, in fact, an expression of that prestige." Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 182, 190 (1958).

118 P. Q. ROCHE, THE CRIMINAL MIND 253-55 (1958).

119 In fact, psychiatrists are instructed that they are to ignore the legal consequences. Bazelon, Remarks on Psychiatry and the Law to the American Psychiatric Association on Sept. 30, 1957.

120 Diamond, *The Fallacy of the Impartial Expert*, III ARCHIVES OF CRIMINAL PSYCHODYNAMICS (1959).

121 18 Ohio St. 2d 182, 248 N.E.2d 614 (1969). *See* section (B) *infra*, for another aspect of this case.

sanity[122] and found no error in rejecting the question since the same opinion had previously been offered in non-hypothetical form.

The primary value in the *M'Naghten* variation adopted in Ohio is that it expresses the lay understanding of insanity as it relates to criminal accountability. This was emphasized by the Court's attitude in *Staten*, and it will be essential that the proof of insanity be directed to that legal concept.

Larceny by Trick and Blackmail.—In *State v. Wilkinson*[123] the Court construed the statutory sections defining the crimes of larceny by trick[124] and blackmail[125] and applied them to an interesting factual situation. Superficially, the crimes would appear to be mutually repugnant, the former involving the obtaining of an item of value by deception, and the latter by threat.

Defendant Wilkinson participated with two codefendants in a scheme to obtain money. They demonstrated a device which purported to change the denominations of currency to increase the value and apparently succeeded in persuading the gullible victim of its practicability. When he hesitated, the defendants threatened him with harm to his family. He subsequently withdrew funds from several banks and surrendered it to the defendants, but they had never withdrawn their promise to return him a profit. Thus, it was impossible to determine as a matter of law which influence, the threat or the opportunity, was the victim's principal inducement. The jury returned a verdict of guilty on both counts of the indictment.

The Court found that the jury could have reasonably found from the evidence the elements of larceny by trick: obtaining possession of something of value with the consent of the transferor, which consent was induced by fraud. But the statutory language on blackmail is more ambiguous. It is necessary that there be a threat and a demand for a thing of value, but the obtaining of possession is not a factor. The first problem was a determination of whether section 2901.38, Revised Code, itself stipulated the types of threats which are proscribed, since the only references are to direct attacks upon the victim; the Court held that harm to a victim's family is within the scope of the general term "threat," and that the term is not qualified by the statutory language. The second problem, raised by this interpretation, was how a person could have been required to surrender the same quantity of money under coercion as he transferred voluntarily under fraudulently induced consent. The resolution of this dilemma was the Court's explanation that a jury could have reached the

[122] Since use of drugs could be compared to alcohol, the use of which does not excuse subsequent conduct.

[123] 17 Ohio St. 2d 9, 244 N.E.2d 480 (1969).

[124] OHIO REV. CODE ANN. § 2907.21 (Page 1954).

[125] OHIO REV. CODE ANN. § 2901.38 (Page 1954).

conclusion that, despite the intervention of a threat between the offer of profit and the transfer, the "victim" still thought he was going to benefit and this anticipation was his primary motivation. Ironically, the efforts of the defense to discredit the victim's testimony referring to the threat could have significantly contributed to this impression.

Evidence, Neutron Activation Analysis.—State v. Holt[126] presented the Court for the first time with the issues of the legal validity of neutron activation analysis as an evidentiary tool for scientifically identifying the source of a substance and the sufficiency of the expert testimony based upon such analysis. Samples of substances to be compared are bombarded with neutrons in a nuclear reactor to convert some of the stable elements into radioactive isotopes; by analyzing these isotopes with radiation detection equipment the chemical elements of the samples may be determined and measured. The process has two favorable characteristics. First, extremely small samples will suffice,[127] and second, the ability to measure numerous elements permits a detailed classification of similar substances into an almost infinite number of sub-categories.[128]

The Court has apparently accepted the reliability of blood tests when competently performed,[129] but when used as a technique to associate a particular defendant with a blood sample located in connection with a crime the admissibility is usually limited to an exclusion of the defendant from the blood type class. Other jurisdictions have permitted the admission of neutron activation evidence, finding it equally as scientific as blood testing.[130] The significant question that remains open is whether the value of this test may go beyond exclusion and also be used to affirmatively identify a suspect.

Defendant Holt was indicted for rape of a seven year old girl. A hair was removed from the person of the victim during treatment in a hospital, another was found on her clothing, and both were preserved. While defendant was in jail following his arrest, a sample of his pubic hair was secured from his underwear. These hairs were submitted to a nuclear chemist for activation analysis.

The defense raised numerous questions as to the performance of the tests, among them the failure to adequately prepare the samples, the small number of hair tests previously performed by the chemist-expert, and the consequence of destruction of the samples which prevented re-testing despite the supposed advantage of the technique that deterioriation of a

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126 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969).

127 Proceedings, 1961 International Conference: Modern Trends in Activation Analysis. Wahl & Kramer, "Neutron-Activation Analysis," 216 Scientific American 68 (1967).

128 ATOMIC ENERGY COMMISSION, NEUTRON ACTIVATION ANALYSIS (1968).

129 *Cf.* City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968).

130 *Cf.* 15 AM. JUR., PROOF OF FACTS *Identification of Substances By Neutron Activation Analysis* § 15 at 134 (1965).

sample should not be required. The Court paid this passing mention but did not offer any specific opinion on the seriousness of these defects.

Instead, Justice Zimmerman's opinion and the syllabus turned on another "important and determinative factor which leads [the Court] to the conclusion that the [expert] witness's testimony should have been rejected and that it was prejudicial error to receive it over objection."[131] That was the restriction which the Court has placed upon an expert's opinion testimony which is based upon scientific fact.[132] When a qualified witness offers an opinion it must be stated in terms of probability. Here the opinion was that samples were "similar and are likely to be from the same source." That did not display the requisite degree of certainty.

The Court's treatment of this statement raises some problems. By stating the conclusion that "the testimony of the witness, . . . the procedures used in such analysis and his ultimate conclusion based thereon, did not reach that degree of certainty which the law demands,"[133] it remains unclear whether the primary objection to the evidence was the Court's skepticism of the exactitude of the type of test, the performance of the particular test, or the lack of precision in the expert's statement.

The unfortunate way in which the expert replied to the opinion question would in itself justify the decision of the Court. He technically stated scientific evidence that went no further than could testimony based upon blood test evidence, that because the two specimens were "similar" the defendant is not eliminated as a possible culprit. The opinion that the hairs "likely" came from the same person then becomes gratuitous.

There is one disconcerting element in the facts of the case which the Court does not discuss. The young victim originally identified another suspect in a police line-up, and he was taken into custody. Subsequently, and for reasons unexplained, the police dismissed him as a possible assailant. Despite the fact that comparable opportunities should have been available to obtain hair samples from that suspect, none were sought and no tests were ever run. Thus, the impression was made that the police used this comparatively recent device to build their jury case and not to convince themselves. In these circumstances any doubts as to the validity of the evidence would naturally be construed against the prosecution, and errors found would be considered prejudicial because of the obvious attempt to awe the jury with expert testimony.

Exclusion of Veniremen Opposed to Capital Punishment.—The federal restrictions upon a state's standards for selection of a jury in a capital case, announced in an opinion by Justice Stewart in *Witherspoon v. Illinois*,[134] came before the Court for the first time this term. As a new and

131 17 Ohio St. 2d at 85, 246 N.E.2d at 367.

132 Shepherd v. Midland Mutual Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156 (1949).

133 17 Ohio St. 2d at 86, 246 N.E.2d at 368.

134 391 U.S. 510 (1969).

pregnant attack upon the death penalty in the United States it was naturally a point in contention in every death case appealed. Two of these appeals, *State v. Wigglesworth*[135] and *State v. Crampton*,[136] and one case remanded from the Supreme Court of the United States for consideration of this issue, *State v. Pruett*,[137] best presented the position of Ohio law. All three opinions were written by Chief Justice Taft.

The tenor of the *Witherspoon case* is a constitutional objection to the systematic exclusion of a class of jurors, which class as a whole does not necessarily reject the obligation to return a verdict based upon the facts in the case and the current state of the law. In these three Ohio cases it is manifest that there was no systematic exclusion of the entire class, but only of the sub-class which admittedly was unable to perform its function according to law.

In each case the Court found no violation of *Witherspoon* on the facts. It was also pointed out that statutory challenges for cause in Ohio, unlike those in Illinois, may be made only when the prospective juror's attitude about capital punishment would preclude him from joining in a proper verdict of guilty with no recommendation for mercy.[138] A further legal argument in support of the decision in *Pruett* was stated in a footnote to that opinion, namely, that failure to raise an objection based upon the statute at trial should prevent reliance upon claimed error in this appeal since the constitutional right goes no further than the statutory right which was specific even before the *Witherspoon* decision.

Although it is true that Section 2945.25(C), Revised Code, comes within the language of *Witherspoon*,[139] it was necessary in the hope of avoiding reversal by the Supreme Court of the United States that the analysis of the cases before the Court go beyond noting this distinction.

The past rationale for applying the Sixth Amendment requirement of "an impartial jury of the state" has been that part of section 1 of the Fourteenth Amendment which says "nor shall any state deprive any per-

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[135] 18 Ohio St. 2d 171, 248 N.E.2d 607 (1969).

[136] 18 Ohio St. 2d 182, 248 N.E.2d 614 (1969).

[137] 18 Ohio St. 2d 167, 248 N.E.2d 605 (1969), *aff'g mem. remand sub nom.* Pruett v. Ohio, 392 U.S. 647 (1968).

[138] "A person called as a juror on an indictment may be challenged for the following causes: . . . (C) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death. . . ." OHIO REV. CODE ANN. § 2945.25 (Page 1954). It may be contended that this language does not justify dismissal of a veniremen for cause if he states that he could find an accused guilty but would not be able to deny a recommendation for mercy in a capital case. If so, then the statute is more favorable to the defendant than is the constitutional rule of *Witherspoon*.

[139] "Nothing we say today bears upon the power of a state to execute the defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at 522, n. 21.

son of life, liberty, or property, without due process of law." *Witherspoon* seemed to hold that the statute in Illinois, in systematically excluding all persons opposed to capital punishment, violated the due process clause by destroying the concept of impartiality. Since the Ohio statute excludes only those who admittedly would be unable, under any circumstances, to enforce the law of the state, including the requisite punishment, there is no state action *per se* which violates the constitutional rights of the defendants.

The only state action which may be found is that of the officials of the state, judges or prosecutors acting in those capacities; and to be condemned, their actions would violate both the Fourteenth Amendment and state statutes. The fact that such actions would be a violation of state law does not prevent them from being state action within the meaning of the due process clause. Thus, it was extremely important for the Court's opinions to persuasively argue the facts of each case to demonstrate a conscientious effort on the part of the trial court and the prosecutor to comply with Ohio law. This was done in sufficient, but conclusory, fashion, possibly due to a fear that the facts which impressed the Supreme Court of Ohio that the *voir dire* was fair and conscientious might be the very quotations which the Supreme Court of the United States would cite out of context for the opposite conclusion.

The contrast between the attitudes and actions of the three trial judges in *Pruett*, *Wigglesworth* and *Crampton*, as compared to the judge in *Witherspoon*, is marked. All three Ohio judges not only participated in the *voir dire* examination, but on several occasions themselves asked the necessary question as to whether or not the prospective juror's beliefs would preclude him from finding a verdict based upon the evidence.

In the *Crampton* case the court refused to dismiss one venireman for cause when the answers to the questions were equivocal, but clearly predisposed to require mercy, and it was necessary for the prosecution to use one of its peremptory challenges. This is to be compared with the statement of the *Witherspoon* trial judge, "Let's get these conscientious objectors out of the way without wasting any time on them." In *Crampton* there is no question, and the appellant raised no question as to any particular juror, that any prospective jurors were disqualified without indicating that their beliefs would preclude their participating in a verdict of guilty which could result in the death penalty.

In the *Wigglesworth* case 13 of 43 prospective jurors were dismissed for cause; only one of these 13 was not questioned as to whether she could join in a verdict involving the death penalty. In this case it would have been worthwhile for the opinion to emphasize two facts: (1) that the court had demonstrated no bias similar to that in *Witherspoon*, and therefore could competently judge the depth of some jurors' beliefs, and (2) by

listening to the responses of the prospective juror and viewing the juror's demeanor, it would be reasonable for the court to terminate the examination of the juror. Furthermore, in this particular case, the state at the completion of the *voir dire* examination, and after the entire panel had been seated, still retained five peremptory challenges which were unused. There could have been no prejudicial error in dismissing such a juror who would undoubtedly have been challenged by the prosecution.

In *Pruett* the appellant, upon remand from the Supreme Court, complained of the examination of only three prospective jurors. Once again, it was valid to emphasize the lack of demonstrated bias on behalf of the court. As to one, or possibly two, of the three prospective jurors, their responses to the examination by the prosecutor were indicative of their probable inability to join in the death verdict. The most that could be said in defendant's favor is that their answers were ambiguous. There is a suggestion in *Witherspoon*, which is repeated in *Boulden v. Holman*,[140] that ambiguity is insufficient for dismissal. However, in each case there was a sustained and repeated effort by the questioner(s) to elicit the juror's true feelings and anticipated ability to perform impartially. The responses of the prospective jurors, combined with the evidence of their demeanor upon questioning, should have reasonably supported dismissal for cause. As to the third venireman, he clearly replied that he could not join in even a proper verdict.

One aspect of the selection of a jury is not discussed in either *Witherspoon* or the opinions of the Supreme Court of Ohio. The number of challenges for cause is unlimited, and to avoid structuring a hopelessly artificial jury such challenges must be restricted to causes which unduly prejudice a prospective juror. Similar restrictions would be necessary for excusing a venireman, either upon his own or another's request, with the additional consideration that substantial difficulties attending his participation may qualify as a valid excuse. But the third method of removing a juror is the peremptory challenge; in Ohio the defense and prosecution each have six of these, to be exercised alternately (or passed) when a tentative panel is seated. By combining valid challenges for cause with its peremptory challenges it might be possible for the prosecution to remove all persons from the jury who affirmatively express any opposition to capital punishment. In that case an argument could be raised that the effect was to systematically exclude.

This argument was suggested in *Crampton* where it was true that, of the 33 prospective jurors examined, the only five volunteering their philosophical objections were dismissed, four for cause and one peremptorily. The other facts in that case, though, were convincing: first, the peremptorily challenged venireman could have been dismissed for cause within

[140] 394 U.S. 478, 481 (1969).

Witherspoon, and second, the other five peremptory challenges were exercised without specific inquiry of each prospective juror as to his general attitude about capital punishment, after he had responded to the court's question that he could join a verdict of death if the facts warranted it. The bills of exceptions presented in *Wigglesworth* and *Pruett* precluded an examination of this theory, and the brief of neither appellant suggested its application.

The purpose of peremptory challenges is to permit counsel on both sides to remove a small number of persons from a jury without having to explain. It is difficult to understand how a review of the use of this privilege would be possible. Nothing would appear in the record to establish more than a doubt as to the actual basis for the exercise of the challenge in each instance. To conclude from the composition of the eventual panel would destroy the purpose of permitting such challenges at all. To prohibit such challenges altogether would be as serious a blow to the defense as to the prosecution. The most that can be said is that the role of peremptory challenges in "systematic" exclusion should be beyond the Court's review unless the number of such challenges which a state permits is unreasonably large.

There is at least the suggestion that the issue which the Supreme Court of the United States expressly reserves[141] may be the second stage in that Court's consideration of Sixth Amendment rights.[142] It is conceivable that there could be a holding to the following effect: if a substantial proportion of a community is convinced that capital punishment is immoral or otherwise reprehensible, a jury should reflect this feeling, particularly in a jurisdiction such as Ohio where jurors of this persuasion could bargain with their co-jurors to convict with a recommendation for mercy.[143] This would appear to be the issue raised by the appellant in *Crampton*, and one

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141 *See* note 139, *supra.*

142 Such an apprehension is aroused by the Court's serial approach of individually applying provisions of the Bill of Rights to the states via the Fourteenth Amendment. Since this has been done to the Sixth Amendment, then it is natural to view *Witherspoon* in the posture of *Escobedo v. Illinois*, 378 U.S. 478 (1964), with the equivalent of *Miranda v. Arizona*, 384 U.S. 436 (1966), to follow.

143 This facet of Ohio practice which adds weight to a defendant's argument to deny any challenge for cause on the capital punishment issue is in curious opposition to one of the issues raised in *Crampton*. There it was contended that requiring the jury to return a single verdict on guilt together with a recommendation for mercy or a failure to so recommend violates a defendant's right to avoid self-incrimination. The basis for that theory is that an accused who does not admit guilt is effectively barred from testifying on factors supporting mercy, either because so to testify would impliedly admit guilt (at least in the eyes of the jury) or because of vulnerability on cross-examination. The Court summarily rejected this contention, analogizing to the similar handicaps experienced in attempts to introduce testimony evidence in support of an alibi, self-defense or a lesser included offense. Of course one distinction, which the Court ignores, is that the examples the opinion offers are all questions of guilt, while the consideration of mercy is purely one of punishment. For whatever reason, California follows the procedure of a two-stage trial, and this might affect the evaluation of *Witherspoon* problems as applied in each state.

which the Court ignored as beyond its obligation to consider under *Witherspoon.*

If this is an accurate prediction as to the course of the Supreme Court of the United States, these cases on review will present a balanced consideration of the issues since the facts, within the *Witherspoon* framework, demonstrate that the defendants in Ohio were genuinely granted a fair trial, both in the technical and in the substantive sense of the word.

Right to Speedy Trial.—The Court went beyond recent decisions of the Supreme Court of the United States during the 1969 term in protecting an accused's right to a speedy trial. *Klopfer v. North Carolina*[144] and *Smith v. Hooey*[145] had held that a person under indictment while incarcerated in a foreign jurisdiction has a right to demand the good-faith efforts of the forum state to attempt to obtain temporary custody for purposes of trial without waiting until his release from his current confinement. The two strongest reasons supporting that conclusion are that a prisoner who has a pending criminal charge against him is customarily denied probation, and that delaying the trial on the pending charge eliminates the sentencing judge's discretion to provide for concurrent terms.

In *Ashmore v. State*[146] the Supreme Court of Ohio encountered a petitioner requesting the prosecution to proceed with its case against him, although he had not been indicted. Ashmore was an inmate in a California state prison, and Ohio authorities had issued a detainer against him based upon a warrant for his arrest on a forgery charge. No effort had been made to obtain his release for trial in Ohio. The Court held that a conscientious attempt to persuade California to temporarily surrender him is required since the detainer subjects him to the same disabilities as would an indictment. Furthermore, although the *per curiam* opinion did not mention this, denying the writ in *Ashmore* would have permitted prosecutors to delay indictment to avoid the *Smith v. Hooey* burden. This decision will undoubtedly affect many counties and increase the demands for funds to proceed in compliance.

In two other cases the Court indicated that the right to a speedy trial must be reasonably construed. The appellant in *State v. Butler*[147] was bound over to the grand jury and released on bond. For twenty-two months nothing happened in his case, and it was later discovered that during the interim the clerk of the municipal court had misplaced his file. After conviction appellant contended that his right to speedy trial had been violated. The Court held that the excessive delay was directly attributable to the failure of defendant to question the status of his case, and that he alleged no prejudice as a consequence.

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144 386 U.S. 213 (1967).

145 393 U.S. 374 (1969).

146 19 Ohio St. 2d 181, 249 N.E.2d 919 (1969).

147 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969).

The only weakness in the argument that the right to expeditious trial must be requested is whether in a particular case a defendant could knowledgably exercise such a request. Defendant Butler was represented by court appointed counsel at trial and upon appeal, but the Court notes that after he was bound over to the grand jury he was free on bond. The fact of this bond is presumed to "belie indigency" and evidence his ability to have employed counsel.[148] That conclusion is questionable.

In addition to constitutional directives there is a statute in Ohio which particularizes at least one aspect of the right to speedy trial. Section 2945.71, Revised Code, requires the discharge of an accused held in jail "without a trial for a continuous period of more than two terms [of court] after his arrest and commitment . . . ." Relator-petitioner in *State ex rel. Hodges v. Coller*[149] filed an action in mandamus and a parallel one in habeas corpus to seek discharge pursuant to that statute. He had been arrested on two charges arising in separate counties. He was in jail in one of those counties for over a year during the course of two trials on one of the charges, and he was then transferred to the second county from which he filed his actions three months later. The Court read the statute in relation to the right to speedy trial and held that, first, the two term period began to run on the second charge only after the defendant was being held under the indictment on the second charge which was after his transfer to the second county's jail (since his principal purpose for being in the first county's jail was not a detainer but the first trial on a separate charge), and second, that if the defendant had desired a trial on the second charge before the conclusion of the first he should have requested it.

In *Ashmore*, *Butler* and *Hodges*, the Court consistently affirmed the right to a speedy trial where the accused pursues it. But where he contributes to the delay or acquiesces in it his rights have not been prejudiced.

Miranda, Misdemeanors and Cross-Examination.—State v. Pyle[150] raised the question, for the first time before the Court, whether the procedural safeguards provided criminal defendants by *Miranda v. Arizona*[151] apply to misdemeanor cases as well as felonies.

In Ohio a felony is a crime for which a person may be sentenced to more than one year of imprisonment and confined to a penitentiary. The Court drew a sharp line between the two classes of crimes and held that it was not required by *Miranda* to apply the pre-interrogation warnings to persons arrested on a misdemeanor charge. This defensive posture of the Court prevented an examination of the merits of the defendant's contentions.

The defendant in *Pyle* was arrested by a State Highway Patrol officer

148 *Id.* at 57, 249 N.E.2d at 819.

149 19 Ohio St. 2d 164, 249 N.E.2d 885 (1969).

150 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969).

151 384 U.S. 436 (1966).

for operating a motor vehicle while under the influence of intoxicating liquor. A conviction on that charge involves a penalty including a fine of "not more than five hundred dollars" and imprisonment "in the county jail or workhouse not less than three days nor more than six months and no court shall suspend the first three days . . . ."[152] Thus, in all instances the guilty defendant will suffer some loss of freedom in addition to pecuniary injury.

Resistance to the decision in *Miranda* may or may not be justified *per se.* But the Supreme Court of Ohio is faced with a clear statement of constitutional law. The Court is expected to accept that law as a definition of the requirements of due process. Once that is recognized the relevant question is not whether *Miranda* must be extended but whether those persons accused of a misdemeanor in Ohio deserve less protection than that which felons can demand.[153]

A misdemeanor is the type of crime that any "ordinary" citizen is most likely to commit. Unlike the hardened criminal, the accused in a traffic offense (such as the defendant in *Pyle*) is exactly that sort of person who is least familiar with his rights. The inconvenience of giving him the summary warnings at the time of his arrest would seldom outweigh the benefit to a person who may well be stunned at having suffered his first criminal arrest.

Such protection is particularly important for a defendant in Pyle's position. Ohio has a statutory presumption of intoxication when the proportion of alcohol in a person's blood is over the specified minimum level, and the Court last term sustained the constitutionality of the admission into evidence of a person's refusal to submit to the test.[154] In order to overcome this combined evidentiary burden, an accused needs to be advised that any intemperate remark he may make to the arresting officer in anger or attempted exculpation may well be used against him as evidence of a general lack of temperance, an impression which will undoubtedly compromise his testimony in the minds of a jury (or judge).

The urging of equal protection for all classes of criminal defendants does not necessarily lead to the approval of the types of protection offered

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[152] OHIO REV. CODE ANN. § 4511.99 (Page 1964).

[153] Chief Justice Taft, in his concurring opinion, is undoubtedly correct in identifying a federal distinction between serious and "petty" offenses and in his conclusion that it would be impossible for the Supreme Court of the United States to logically impose stricter requirements on the states through the Fourteenth Amendment than it enforces in the federal system directly through the Bill of Rights. But this is basically a rear-guard action against *Miranda* and does not face the issue of whether Ohio courts *should* adopt the policy of denying an extra-constitutional protection to petty offenders which is constitutionally guaranteed to more flagrant law violators. Furthermore, it will not apply to Ohio misdemeanors with possible penalties greater than six months, and Ohio might be faced with a procedural protection line drawn between different types of misdemeanors, unless the General Assembly would change the definition of serious crimes to conform to federal statutes.

[154] Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968).

any of them. Thus, the holding of the Court in *State v. Butler*,[155] that a defendant cannot rely upon the failure to give the *Miranda* warnings to prevent use of prior inconsistent statements to impeach his testimony, appears sound. The thrust of *Miranda* and its predecessors is an attack upon illegal and coercive police tactics, and in the opinion of a majority of the Supreme Court of the United States the only effective way to prevent such practices is to forbid the affirmative use of any benefits the prosecution might receive therefrom. But the opinion of Justice Schneider seems irrefutable when it says that voluntary statements made to the police may be used for impeachment in cross-examination because the privilege accorded an accused to refuse to testify should not be translated "into a privilege to lie with impunity once he elects to take the stand to testify."[156] It is important to remember that the Fifth Amendment establishes the principle that no person should be compelled to incriminate himself, not that a guilty person may use any technique of deception to avoid conviction.

C. *Trial Practice*

A number of cases were before the Court this term requiring consideration of the proper practices in the conduct of a judicial proceeding. The issues ranged from initial problems of indictment and pleading, through the course of trial, to the charge to the jury, and ultimately to appeal. Because of the relationship of these stages, representative cases are considered here as a unit, despite the admitted misnomer of the label "trial practice."

The Court may be observed in this area experiencing one of the more uncomfortable dilemmas of reviewing bodies. In instances where trial courts indulge in discredited practices or lapses of quick judgment it is desirable to point out the preferable practices for the guidance of other courts, but often this does not even cumulatively amount to prejudicial error reflecting upon the integrity of the result below. This situation calls for affirmance with words of chastisement as dicta, hopefully not to be ignored by other courts when faced with a similar situation.

Pleading Guilty before Administrative Panel.—The appellee in *Dept. of Liquor Control v. Santucci*[157] was the holder of three permits to sell alcoholic beverages and was brought before the Liquor Control Commission on charges of having violated commission regulations. The commission is authorized to determine the appropriate penalties when violations occur. At his hearing, Santucci, apparently anticipating a brief suspension of his licenses, responded to the inquiry of the commission chairman that he was "guilty." The commission then imposed suspensions totaling 250 days.

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155 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969), note 147, *supra.*

156 *Id.* at 60, 249 N.E.2d at 821.

157 17 Ohio St. 2d 69, 246 N.E.2d 549 (1969).

On appeal to the Court of Common Pleas pursuant to Section 119.12, Revised Code, Santucci contended that the commission proceedings were defective because there was no presentation of evidence as required by statute.[158]

The opinion of the Court by Justice Zimmerman demonstrated an attitude of impatience with such overly technical objections. In this case the Court gave a reasonable interpretation to the statute and concluded that an admission by a permit holder of his guilt in a proceeding in which he was permitted to have counsel, present evidence, and examine witnesses either amounted to a waiver of evidence or was evidence in itself.

The Court's comparison of these proceedings to criminal cases should be contrasted with the first paragraph of its *per curiam* opinion in *Kyle v. Fok*.[159] In that opinion, three members of the Court and one Court of Appeals judge sitting by assignment stated that "the motion to certify was allowed because a majority of the Court is of the opinion that such use of the word 'guilty' in civil damage actions is reversible error." Neither a Liquor Commission hearing nor a wrongful death action is criminal in nature. For some reason, the Court was able to draw a line between these two cases. While this remains unexplained, the only obvious distinction is that the wrongful death action is tried before a jury which might be more easily prejudiced than the administrative agency. Another possible explanation is that Santucci voluntarily defined his conduct as amounting to guilt, but the phrase in *Fok* was introduced in the court's special instructions before argument.

Voluntary Dismissal by Plaintiff After Expiration of Period of Limitations.—A plaintiff may dismiss a civil action without prejudice at any time prior to its submission to the finder of fact.[160] If this dismissal is prior to the expiration of the period of limitations, there is no restriction upon recommencement of the action. If the dismissal occurs after the period provided in the applicable statute of limitations has expired, the plaintiff is barred from instituting a new proceeding unless the dismissal comes within the statutory savings clause for cases that have failed "otherwise than upon the merits."[161]

The plaintiff in *Beckner v. Stover*[162] argued that any voluntary dismissal without prejudice is a termination of a case which is not decided upon the merits and thereby comes within the statutory one year savings period. It is obvious that such an interpretation, together with the acknowledged right of a plaintiff to dismiss for any reason, would allow a plain-

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158 OHIO REV. CODE ANN. § 119.12 (Page 1968).

159 18 Ohio St. 2d 70, 247 N.E.2d 457 (1969).

160 OHIO REV. CODE ANN. § 2323.05 (Page 1953).

161 OHIO REV. CODE ANN. § 2305.19 (Page 1953).

162 18 Ohio St. 2d 36, 247 N.E.2d 300 (1969).

tiff to repeatedly attempt to bring his claim before the judge and jury of his choice. The Court understandably rejected this holding of the Court of Appeals.

In reaching this solution the Court resurrected two old cases[163] and explained a comparatively recent one.[164] The Court of Appeals had concluded that the latter case modified the previous firm position of the Court by applying the one year provision to a voluntary dismissal entered after the trial court had sustained a second demurrer to plaintiff's petition.

The opinion by Justice Herbert reasoned that, in effect, a termination of a case is not necessarily a failure of that case. A case has "failed" within the meaning of the statute only where the ruling of the Court prohibits the further progress of the suit upon the plaintiff's theory of law. This is not so where the plaintiff may actually proceed despite a handicap in the use of his preferred techniques of trial. A trial judge has the discretion and responsibility to supervise the conduct of those cases appearing before him. An unreasonable use of that discretion may be challenged upon appeal as amounting to error. A plaintiff does not have the option to evade such unfavorable court attitudes by starting at the beginning again.

Amendment of Pleading After Expiration of Period of Limitations.— The previous discussion showed the Court unwilling to extend a limitations period savings clause to voluntary dismissals of law suits other than those which are related to the impossibility of trying a case upon the merits. This same reasoning would normally prevent a plaintiff from relying upon the doctrine of relation back in amending a petition after the expiration of the period of limitations, when the amendment changes the cause of action.

In *Bush v. Kelley's, Inc.*[165] the Court, in an opinion by Judge Cole,[166] avoided questioning this theory. The plaintiff's original petition, which was filed within the period of limitations, alleged an intentional tort in the forcible ejection of him from a tavern. After the expiration of the two year period of limitations, the petition was amended to delete the allegations of intent and substitute negligence. The Court permitted this amendment to relate back, purportedly on the authority of *Cohen v. Busey*.[167] In that case an amendment of a petition was sustained where the allegation of negligent injury was enlarged to include intentional acts.

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[163] Seigfreid v. Rd. Co., 50 Ohio St. 294, 34 N.E. 331 (1893); Buehrer v. Provident Mutual Life Ins. Co., 123 Ohio St. 264, 175 N.E. 25 (1931).

[164] Cero Realty Corp. v. American Mfgrs. Mutual Ins. Co., 171 Ohio St. 82, 167 N.E.2d 774 (1960).

[165] 18 Ohio St. 2d 89, 247 N.E.2d 745 (1969).

[166] Sitting on assignment.

[167] 158 Ohio St. 159, 107 N.E.2d 333 (1952).

Judge Cole concluded that the *Cohen case* had recognized ". . . a single cause of action sounding both in intentional and negligent tort."[168]

The wisdom of the *Cohen case* is itself subject to criticism, but it does not necessarily follow that the holding in *Bush* is dictated by the result in *Cohen*. It is simple to view both of these cases as mere anticipations of Ohio's adoption of the federal rules for civil pleading. Under that system, Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."[169] Once the defendant is upon notice of the incident to which the plaintiff refers, the defendant is expected to resort to discovery devices in order to determine the possible legal theories which support the plaintiff's claim. But in *Bush*, the plaintiff had voluntarily defined his action as one involving an intentional tort. A defense which would defeat such a claim would be the denial of the element of intent. By its decision the Court has encouraged plaintiffs to allege the most serious theory of a case and, when confronted with an imminent failure of proof, to be benefited by what amounts to a lesser-included-offense approach to civil actions. *Cohen* did not involve this factor. When the petition was enlarged in that case the plaintiff assumed an increased burden of proof.

The net result of *Bush* and *Beckner* is an inconsistent attitude toward vacillating plaintiffs.

Dismissing Assigned Counsel During Trial.—The indigent defendant in *State v. Deal*[170] was represented at trial by appointed counsel. After the presentation of the state's evidence the defendant repudiated that counsel, complaining to the court that he had failed to adequately prepare a defense. Among other defects, Deal alleged that the appointed lawyer had ignored the alibi witnesses of whom he had been informed and failed to file a notice of alibi before trial. The trial judge urged him to reconcile with the lawyer, and when Deal refused to recognize him as his representative the court proceeded with the conclusion of the case by directly asking the defendant questions. In response to one of those questions the defendent indicated that he would take the stand with different counsel, but not with the original one and not alone. The defendant requested a three week continuance and claimed he would somehow get his own lawyer, despite his continuing indigency. The court refused, closing arguments were waived, and the case submitted to the jury. The defendant, with new counsel, appealed from a verdict of guilty.

The *Deal* situation is extremely awkward for both the trial and appellate courts. To preserve the fairness of the adversary system the review of such a case requires particular sensitivity to the prejudicial effect of a

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168 18 Ohio St. 2d at 93, 247 N.E.2d at 748.

169 *See* Rule 8(a), proposed Ohio Rules of Civil Procedure.

170 17 Ohio St. 2d 17, 244 N.E.2d 742 (1969).

defendant who is not only unrepresented in the presentation of his evidence, and claims that appointed counsel contributed to his inability to proceed, but whose dissatisfaction and frustration is repeatedly aired before a jury in the face of an unsympathetic judge. But the appellate court must avoid the impression that any indigent accused can obtain a new trial merely by refusing to cooperate when, at the conclusion of the state's presentation, he can see that his chances for acquittal are nil. The problem is basically one of evaluating whether a defendant's complaints of inadequate or incompetent representation have any merit without involving the jury in that investigation.

The Court established a sound procedure for the future by requiring a hearing on the record outside the presence of the jury. This recognizes that the trial judge is necessarily the master of the court with considerable discretion. Yet he also has a unique obligation to insure that those lawyers who are appointed by the court perform in an exemplary manner. Thus, an indigent defendant in some ways has greater protection than one with retained counsel who will ordinarily be bound by his lawyer's decisions. In order to obtain this extra measure of court supervision he has, of course, sacrificed his right to choose his own counsel.

After the trial judge has made the appropriate inquiry, if he finds the defendant's complaints to be unfounded or insignificant he may order the defendant to proceed. Any defendant who thereafter is recalcitrant or dismisses his counsel does so at his peril since his previous objections are on the record for later review.

In order to avoid the impression that the behavior of the defendant in this case might benefit him where it was unwarranted, merely because the trial judge was apparently surprised by the turn of events, the Court remanded the case for the Court of Common Pleas to investigate the complaints of incompetence for the record, rather than granting a new trial.

This formal reversal with a limited remand temporarily avoided the problem of whether the trial judge, in repeatedly asking the defendant whether he wished to take the stand, violated the principles enunciated in *Griffin v. California*[171] where it was held to be a violation of a defendant's Fifth Amendment rights for the prosecutor to comment to the jury upon a failure to testify. If the lower court concludes that the objections to counsel were unfounded, then this *Griffin* variation will undoubtedly be raised in a new appeal. The delicate balance there between the efficient conduct of a trial by the judge and the protection of the impression of a judge's neutrality before the jury will again have to be confronted.

Summarizing Petition in Charge to Jury.—It has been an historically common practice for Ohio plaintiffs to phrase petition allegations in the most prejudicial manner. This was encouraged by the submission of

[171] 380 U.S. 609 (1965), *rehearing denied*, 381 U.S. 957 (1965).

pleadings to the jury for perusal during their deliberations. Conscientious trial courts have eliminated this custom in recent years with written instructions to the jury and the withholding of the petition and answer. The Court clearly indicated this term that this is the favored procedure.[172]

The problem is that some courts have merely compromised, in order to avoid considerably greater work in the preparation of individual instructions in each case, by summarizing or reading the pleadings to the jury. In many cases this is more harmful than the submission of the written documents since only the inflammatory portions may be recalled by the jurors.

In *Valentino v. Keller*[173] the Court reviewed an instruction which summarized the petition and held it not to be error if the trial court also instructs that the pleadings are not evidence and the jury's decision must be limited to the evidence presented. But this case does not necessarily sanction the practice, even when limited by the further instruction, in all cases. *Valentino* was an appeal to the Court of Common Pleas by a workmen's compensation claimant from a series of adverse administrative rulings. The statutory authorization for such an appeal requires the petition to set forth the basis for the trial court's appellate jurisdiction, namely the exhaustion of administrative remedies.[174] So in this case it was ironically the plaintiff who was complaining that the trial court summarized the unfavorable administrative history which the plaintiff was required to include in his own petition.

There are two sound reasons which support the Court's decision. First, the statute required the compromising allegations, and the General Assembly enacted this requirement in the face of the prevalent submission of pleadings to juries. This was the ground upon which the Court relied. But second, there is a further relevant consideration that the Court of Common Pleas is performing a unique function in workmen's compensation appeals, and the jury is in the position of a Court of Appeals which is reviewing a case on a law and fact appeal.[175] Appellate jurisdiction is necessary, and a jury which the law provides to decide an appeal has the right to understand its relationship to the case, particularly since this is not the normal jury role.

A similar theory is stated in *Masci v. Keller*,[176] also a workmen's compensation appeal decided during the 1969 term. There the petition named both the Administrator of the Bureau of Workmen's Compensation and the injured workman's employer as defendants, and the special instructions to the jury referred to both defendants although only the ad-

[172] Cincinnati v. Bossert Machine Co., 16 Ohio St. 2d 76, 78, 243 N.E.2d 105 (1969).

[173] 17 Ohio St. 2d 21, 244 N.E.2d 750 (1969).

[174] OHIO REV. CODE ANN. § 4123.519 (Page 1964).

[175] Although the trial is an "appeal," it is *de novo*.

[176] 18 Ohio St. 2d 67, 247 N.E.2d 457 (1969).

ministrator was actively participating in the litigation. The Court noted that both defendants had to be named to conform to the statute, and it is common knowledge that the employer is involved in the case. Thus, since a proper instruction as to the issue before the jury was given, the form of special instructions was not prejudicial error.

The Court's holding will serve to prevent similar assignments of error only in the succeeding few years since its proposed Rules of Civil Procedure contemplate a specific prohibition of either the reading or submission of pleadings,[177] and when effective they will supercede conflicting statutes.

State Appeal from Grant of New Trial.—The indictment involved in *State v. Huntsman*[178] charged the defendant with the rape of a female person under 12 years of age on November 22, 1966. The prosecution argued to the trial court that the date was inaccurately transcribed and, as a consequence of a typographical error, recorded as November instead of October, the month indicated in the evidence presented to the grand jury. The court allowed an amendment, over objection by defendant's counsel, and proceeded to trial. This amendment proved to be crucial since the evidence presented to the jury established the victim's twelfth birthday as October 26, 1966. A new trial was granted on the basis of a change in a material element of the indictment which, in its original form, did not state the crime supported by the evidence. The state appealed.

The Court failed to reach the principal issue which was argued to it—the merits of allowing the amendment. Instead the syllabus and Justice Matthias' opinion determined that the state has no right of appeal from the grant of a new trial, and, therefore, the question of the indictment was not properly before either the Court or the Court of Appeals. Because of this procedural complication an opportunity was lost to discuss the constitutionality of a court amendment of a material defect in an indictment. If a criminal defendant has a right to an indictment when there is no affirmative waiver,[179] then part of his protection should be his right to construct a defense upon both factual and legal vulnerabilities in the formal charge of the crime. Changes in the indictment which change the crime should only be made by a grand jury.

The Court adopted the reasoning of the concurring opinion of Chief Justice Taft in *Price v. McCoy Sales & Service, Inc.*,[180] to the effect that an order granting a new trial is a "final order" subject to appeal within the the meaning of the constitution,[181] and the majority opinion of Chief Justice Taft in *Toledo v. Crews*,[182] construing the statutory appeal provisions

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[177] Rule 8(g).

[178] 18 Ohio St. 2d 206, 249 N.E.2d 40 (1969).

[179] *Ex parte* Stephens, 171 Ohio St. 323, 170 N.E.2d 735 (1960).

[180] 2 Ohio St. 2d 131, 207 N.E.2d 236 (1965).

[181] OHIO CONST. art. IV, § 3(B)(2); formerly art IV, § 6.

[182] 174 Ohio St. 253, 188 N.E.2d 592 (1963).

for criminal cases as limited to appeals by defendants.[183] There is a curious shift of emphasis in these two opinions, all the more noticeable since Justice Matthias expressly chose the *McCoy* concurrence's theory of a constitutional holding in preference to the statutory interpretation of the majority opinion by Judge Herbert, and then relied upon the statutes enacted pursuant to that same constitutional provision to reject the instant appeal on the authority of *Crews*.

This apparent paradox in choice of authority is subject to explanation. Section 3(B)(2) of Article IV, Ohio Constitution, allows appellate jurisdiction " . . . as may be provided by law to review and affirm, modify, or reverse judgments or final orders . . . ." Thus, the General Assembly was granted authority to create appellate review of those "judgments or final orders" which it chose to so qualify, but Chief Justice Taft correctly observed in *Crews* that it could not extend review to any order which was not already "final" as that term is used in the constitution. In other words, statutory review of an otherwise interlocutory order would be void, but no final order as such is appealable unless provided for in a statute. Because an order granting a new trial after a verdict is returned is by its nature a final order, it may be appealed when the General Assembly has provided for it, but there is no statutory provision for an appeal by the state in this situation.

It is important to realize that neither this decision nor the rationale upon which it is based denies the constitutionality of a state appeal from a new trial order. The very reasoning which supports the conclusion that such an order is "final" also suggests that the legislature could extend review in criminal cases. The jury has returned its verdict, and, unlike court rulings prior to that point, error in granting a new trial does not affect their determination. There is no difference, for purposes of the appropriateness of a state appeal, between a new trial which is allowed by the trial court upon defendant's motion after a verdict of guilty and one erroneously allowed by an intermediate appellate court.

Appeal on Law and Fact.—Lincoln Properties v. Goldslager[184] involved an appeal on law and fact to the Court of Appeals from a judgment of the Court of Common Pleas refusing an injunction. The Court of Appeals concluded that the judgment of the lower court was against the weight of the evidence presented, but it considered that further evidence would be desirable and remanded the case instead of granting the equitable relief sought. From this half-victory the plaintiff appealed.

For the first time the Court was faced with the question of an appellate court's obligation on an admittedly proper law and fact appeal. The holding was that the Court of Appeals *must* enter a final judgment.

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[183] OHIO REV. CODE ANN. § 2953.02, *et seq.* (Page 1953).

[184] 18 Ohio St. 2d 154, 248 N.E.2d 57 (1969).

Historically, an "appeal" or what is now called an "appeal on law and fact" (as distinguished from the former "error proceeding" or what is now called simply an "appeal") was available in those cases of an equitable nature which were quaintly termed "chancery cases."[185] This remains the standard, but the General Assembly has attempted to prevent argument by specifying the varieties of relief which it recognizes as lying primarily in equity.[186] In any case where one of those categories is employed in the primary prayer of the petition, an appellant may obtain a trial *de novo* in the Court of Appeals based upon the lower court record, amendments to the pleadings and additional evidence if necessary "in the interest of justice."[187]

The problem shifted during the 1969 term from the applicability of the law and fact appeal to the substance of that appeal when granted. The Court sustained the unique Ohio theory that an appeal involving a trial *de novo* is an entirely new proceeding, and even the record created in the lower court does not control.

An interesting discrepancy appears when the two relevant statutory sections are compared. Section 2501.02 directs the Court of Appeals on a law and fact appeal to ". . . weigh the evidence and render such judgment or decree as the trial court could and should have rendered upon the original trial of the case . . . ." But section 2505.21 permits the parties to present only part of the record below, to amend pleadings and to introduce new evidence. It is obvious that a Court of Appeals could be presented a case with a posture entirely different from that before the trial court. If this occurs, the question arises as to how the trial court "could" or "should" have rendered a judgment based upon a record significantly different from that which the Court of Appeals reviews.

In hearing an appeal *de novo* the Court of Appeals often lacks adequate facilities for the practical presentation of new evidence. The use of depositions and affidavits is sometimes sufficient for testimonial evidence, but not always. The Court has the power, pursuant to section 2505.21, to specify the "manner and form" of the taking of additional evidence, and this has often been used to appoint master commissioners for that purpose. *Lincoln Properties* limited this discretion of the Court of Appeals by dicta to the effect that the appellate court could not ". . . appoint the Court of Common Pleas as its master commissioner." No authority was cited for that proposition. The apparent fear is that such a practice would emasculate the right to *de novo* review by creating in effect a new trial below.[188]

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185 *See* Westerhaus Co., Inc. v. Cincinnati, 165 Ohio St. 327, 135 N.E.2d 318 (1956).

186 OHIO REV. CODE ANN. § 2501.02 (Page 1953).

187 OHIO REV. CODE ANN. § 2505.21 (Page 1953).

188 Similarly, the question has arisen in tax cases whether the Board of Tax Appeals has the authority, following remand from the Supreme Court, to further remand a case to the Tax Com-

Another interesting problem is suggested by the right to amend pleadings without leave of court. A litigant who realized that his performance at trial was inadequate for reversal on questions of law, particularly when attributable to his omissions, might on appeal amend his pleading to request equitable relief. The question would then arise whether his right to an appeal on law and fact should be determined from the original or amended pleadings. Presumably, even if his right to a *de novo* hearing would be sustained, it would not be "in the interest of justice" for the Court of Appeals to allow additional evidence to fill earlier gaps.

D. *Workmen's Compensation*

Mandamus as a Remedy.—In two cases this term the Court continued to apply the doctrine that mandamus cannot be used as a substitute remedy for an appeal to the Court of Common Pleas pursuant to section 4123.519, Revised Code. *State ex rel. Foley v. Grayhound Lines*[189] involved a relator who had been awarded compensation on the basis of permanent total disability in 1965. He later had an amputation, attributable to his original injury, and filed an application to be paid additional compensation for the loss of his member. An order of the Administrator of the Bureau of Workmen's Compensation, vacating an award of additional compensation made by the assistant administrator, was affirmed by the regional board of review, and an appeal to the Industrial Commission was denied. At that point, instead of pursuing his statutory route of appeal, relator filed a petition in mandamus, and a writ was granted by the Court of Appeals after overruling a demurrer to the petition. The Supreme Court reversed, noting that since relator had been previously awarded compensation for total disability, the application in question was ". . . other than a decision as to the extent of disability. . . ."[190]

Although an appeal from the dismissal of a petition in mandamus was decided on its merits in *State ex rel. Latino v. Indus. Comm.*[191] last term, it was pointed out there in the opinion of Brown, J., that the existence and adequacy of a remedy at law was not raised in the Court of Appeals. Appellants in *Foley* specifically demurred to the petition on this ground. Thus, the case was squarely within paragraph one of the syllabus in *State ex rel. Benton v. C. & S. O. Elec. Co.*,[192] decided in the same term as *Latino*:

> "Mandamus can not be used as a substitute for an appeal pursuant to Section 4123.519, Revised Code, where an appeal thereunder is available to test a determination of the Industrial Commission."

missioner. *Cf.* OHIO REV. CODE ANN. § 5703.05 (Page 1953); Clark v. Glander, 151 Ohio St. 229, 85 N.E.2d 291 (1949).

189 16 Ohio St. 2d 6, 241 N.E.2d 904 (1968).

190 OHIO REV. CODE ANN. § 4123.519 (Page 1964).

191 13 Ohio St. 2d 103, 234 N.E.2d 912 (1968).

192 14 Ohio St. 2d 130, 237 N.E.2d 134 (1968).

In a *per curiam* opinion this term, *State ex rel. Ferris v. Indus. Comm.*,[193] the relator-appellant attempted to avoid the previous decisions of the Court by alleging an action of the administrator which was invalid on its face. The administrator had terminated the compensation payments of relator after finding that he was currently receiving Social Security benefits and was, as a result of this, no longer within the state work force. Once again, the Court characterized this as a dispute not going to the extent of the claimant's disability, and the judgment of the Court of Appeals, sustaining a demurrer to the petition, was affirmed. This series of cases clearly demonstrates the Court's impatience with claimants who attempt to insert another strike in the form of an original action into the statutory list of five appeals[194] already available.

The Court's repeated statements of this theory on mandamus had the ironic effect of overkill in *State ex rel. Lurty v. Indus. Comm.*[195] Following the decision in *Foley*, relator in *Lurty* filed an action in mandamus in the Court of Appeals for Franklin County requesting that the Industrial Commission reconsider his claim for compensation on account of an alleged impairment of his earning capacity due to an occupational disease.[196] The Court of Appeals denied the writ, stating that: "since extent of disability is not at issue, the case is governed by the recent case of [*Foley*]." However, as the Attorney General conceded on appeal, the Court of Appeals was in error for the reason that there is no right of appeal to the Court of Common Pleas in cases involving occupational disease claims.[197] Therefore, there was no appeal in the ordinary course of the law, and the court reversed and remanded to the Court of Appeals for consideration on the merits.

Foley and *Ferris*, both denying mandamus as a remedy, relied upon the fact of a remedy in the ordinary course of the law by way of appeal pursuant to section 4123.519. The issue which that section requires a jury to determine in such an appeal is whether the claimant shall ". . . participate or . . . continue to participate in the fund." In *Foley* and *Ferris* the Industrial Commission had found legal obstacles to any type of further participation in workmen's compensation fund distributions which were unrelated to the extent of disability that had been suffered, precisely the situation envisioned for a statutory appeal. If the Court of Common Pleas would determine in either case that additional compensation payments

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193 17 Ohio St. 2d 49, 245 N.E.2d 357 (1969).

194 From the adverse decision of the administrator to the regional board of review, then to the Industrial Commission, the Court of Common Pleas for a trial *de novo*, the Court of Appeals, and finally to the Supreme Court. This structure was properly used in *Valentino v. Keller*, 17 Ohio St. 2d 21, 244 N.E.2d 750 (1969).

195 18 Ohio St. 2d 107, 247 N.E.2d 863 (1969).

196 OHIO REV. CODE ANN. § 4123.57(A) (Page 1964).

197 Szekely v. Young, 174 Ohio St. 213, 188 N.E.2d 424 (1963).

should be made, the Industrial Commission would then have exclusive jurisdiction to determine the extent and manner of participation.[198]

Where there is no statutory appeal mandamus *may* lie. The holding of the Court in *Lurty* was simply that the Court of Appeals had been too hasty and it should consider whether the merits of relator's petition justified an extraordinary writ. The decision in *State ex rel. Pressley v. Indus. Comm.*[199] stated the controversial rule that both the Court of Appeals and the Supreme Court must exercise their original jurisdiction in mandamus when there is a violation of a clear statutory duty and no remedy in the ordinary course of the law. The modern courts amendment to the constitution prevents restrictions upon that jurisdiction by rule of court.[200] But neither of those pronouncements extend the application of the writs, and the clear statutory duty phraseology is merely an expression of one of those situations which is "extraordinary" or of great and general interest, or should be.

By its nature mandamus does not require statutory authorization. Thus, it is unnecessary for a workmen's compensation question to be a decision of "the extent of disability" for mandamus to apply.[201] The opposite conclusion is the result of an incorrect reading of section 4123.519. Although questions of the extent of disability are specifically exempt from that section's appeal provisions, it does not follow that all other disputes are appealable thereunder so as to provide a common remedy. On the contrary, only those disputes which might reasonably be resolved by the jury's conclusion of participation or non-participation in the fund are proper subjects of appeal. Issues of the extent of disability *plus* all other issues which are inconsistent with the role of the Court of Common Pleas are not appealable.

But the fact of a lack of a legal appeal for any given question, determined by the Industrial Commission adversely to the claimant, does not in itself support jurisdiction for mandamus. This has been a false conclusion of many litigants, including the office of the Attorney General.[202] The

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198 166 Ohio St. 477, 144 N.E.2d 189 (1957).

199 11 Ohio St. 2d 141, 228 N.E.2d 631 (1967).

200 OHIO CONST. art. IV, § 2(B)(3).

201 Justice Duncan's opinion in *State ex rel. Mansour v. Indus. Comm.*, 19 Ohio St. 2d 94, 249 N.E.2d 775 (1969), appears to fall into this trap of either/or statutory construction. The double negative wording of paragraph two of the syllabus has the distinct advantage of permitting the Court to explain in a later case that this did not amount to an affirmative statement, and a broader theory of mandamus may be adopted. To state the affirmative of Justice Duncan's double negative namely that a dispute not logically solved by the jury verdict under section 4123.519 is one involving "the extent of disability," tortures the clear import of that language, as demonstrated in the *Mansour case* where the issue was the election of manner of payment after the percentage of disability had been found and the claim allowed.

202 *See* Brief for Appellee, State ex rel. Shewalter v. Indus. Comm., 19 Ohio St. 2d 12, 249 N.E.2d 51 (1969). Here the Attorney General, as counsel for the Industrial Commission, conceded that the Court of Appeals erred in basing its denial of a writ of mandamus upon *Foley* and the availability of an appeal, but failed to urge the alternative ground of immunity of the

other prerequisite of an extraordinary situation or ruling must also be alleged for a valid petition and found to support a writ. In *State ex rel. Mansour v. Indus. Comm.*[203] the Court went beyond the formal entry of the commission and found such facts, which had been raised before the Court of Appeals by the petitioner. The commission had adopted a rule prohibiting a change in election as to manner of compensation where the claimant had been represented by counsel at the time of his original election of one of the two statutory alternatives. In view of the provision of section 4123.57, Revised Code, permitting a change of election for good cause shown, the Court held that a rule arbitrarily denying good cause where counsel advised the original election was unreasonable. The case therefore dissolved into a classical abuse of administrative discretion to which mandamus may always apply as the traditional remedy, regardless of any statute. Paragraph 2 of the syllabus in *Mansour* was totally unnecessary to support the judgment.

The *Mansour case* did not erode the principle that the ordinary decisions of the commission in individual cases, including particularly the factual determinations of extent of disability based upon medical reports and acquired expertise, are not subject to judicial review. There is no reason to believe that the legislature would have more confidence in a Court of Appeals or Supreme Court mandamus hearing than a Court of Common Pleas *de novo* review of such questions. In *Mansour* itself, if the commission had reached the same conclusion, of no good cause to change the election, after a consideration of the matter beyond its rule, there would have been no basis for any court to give an independent judgment.[204]

The decision in *State ex rel. Shewalter v. Indus. Comm.*[205] may be reconciled with this presentation of the law. There the dispute clearly related to the extent of disability, and the Court of Appeals was totally incorrect in relying upon *Foley* to deny the writ. The majority of the Court, after recognizing the lack of a remedy by appeal, then joined in a *per curiam* opinion allowing mandamus to issue because they interpreted the stipulation of facts to indicate an undisputed disability which the commission refused to compensate.

But the division of the Court suggests, and the stipulated facts disclose, that the case is not that simple. The Industrial Commission is not the type of board to obstinately deny compensation for admitted disabil-

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commission from judicial review in the ordinary course of administration of the workmen's compensation fund.

[203] See note 201 *supra.*

[204] *See* Szekely v. Young, *supra* note 197. However, Justice Schneider's concurring opinion seems to suggest the contrary. His conclusion that, applying *Foley* only prospectively, the proper remedy is either an appeal or an injunction does have the desirable effect of reducing the use of mandamus in the superior courts as a regular course for relief, but it impliedly rejects the conclusion that for many commission decisions there will be no judicial review.

[205] 19 Ohio St. 2d 12, 249 N.E.2d 51 (1969).

ities. Its refusal to authorize an award for an injury to a location for which the claimant had been compensated after a previous injury, or to authorize an additional award for an aggravation to the previous injury, may have been based upon either of two decisions. First, it may have believed the first medical report following the second injury to the effect that there was only a minimal degree of disability. Or secondly, it may have concluded as a matter of law (interpreting *Foley*) that since the modified original award was for 50 percent permanent partial disability, and no medical evidence showed an increase to in excess of that percentage after the second injury, there was no further disability justifying either an additional award or a second award. The first basis should be secure from judicial review if any reasonable mind could have so concluded, with special consideration given to the commission's familiarity with these cases and doctors. The second basis might be a valid ground for mandamus if the Court would hold that this is a mistake of law. However, they did not even consider the issue. *Shewalter* can only be described as a digression from the construction of a well-balanced theory of mandamus as a workmen's compensation remedy.

E. *Negligence*

Duty of Possessor of Land.—In 1951 the Court clearly defined the status of a social guest and the concomitant duties of an owner or occupier of land. *Scheibel v. Lipton*[206] rejected the classification of a social guest as a licensee,[207] but it did not confer all the protections given to a business invitee. The social guest became a legal category with its own rules of law. This approach was an obvious compromise, allowing broader rights of recovery for injuries sustained by the innocent social guest when the risks outweigh the public value of promoting private hospitality, but retaining the advantages of predictable rules of law. Such rules are necessary for the host to understand his duties and anticipate the requirements for various types of uses of his land, in other words to plan ahead and make informed decisions. The rules are also necessary for the guidance of trial courts; it is evident that if all cases go to a jury the ability of a possessor of land to rely upon legal definitions of his duty is seriously impaired because predictability of liability is decreased.

Scheibel proceeded to stipulate two legal duties of the social host. First, while the guest is on the premises of the host the latter must refrain from any act or activity, not consistent with ordinary care, which might cause injury to the guest. And second, if there are dangerous conditions on the premises, which the guest would not reasonably anticipate or discover, then the host must warn of their existence.[208]

[206] 156 Ohio St. 308, 102 N.E.2d 453 (1951).

[207] *Id.* at 328-29, 102 N.E.2d at 462-63.

[208] *Id.* at 308, para. 3 of syllabus.

This term the Court had to apply its *Scheibel* rules. In *DiGildo v. Caponi*[209] a four year old child accompanied his family on a social visit to the home of friends where they had often gone on other occasions. While in the second floor apartment the adults directed the children of both families to play outside. There the host family's car was parked on an inclined driveway, and it was left unlocked. The children played in the vehicle, the gear-shift lever was removed from the "park" position, possibly the emergency brake was released, the vehicle began to back down the drive, and the four year old soon-to-be-plaintiff injured his hand in trying to escape.

The Court showed no inclination to decide the case on grounds other than a jury verdict. In the factual situation it would not have been inconceivable that as a matter of law the plaintiff's parent, who had accompanied him and must have noticed the position of the automobile since he had to walk past it up the drive to enter the home, would have been responsible rather than the social host. Why should the host be required to warn the child of a guest when the child's parent is equally aware of the danger and the host would not normally so warn his own children?

Nevertheless, the decision turned around the rationale for properly submitting the evidence to the jury. The opinion of Justice Schneider presents a sound theory, but it is somewhat obscured by dicta. The holding may be summarized as follows: The child-guest's infancy is one condition in determining the guest's ability to perceive a dangerous condition; the location and vulnerability of the automobile may properly have been found dangerous by a jury; and the host failed in his duty to warn.

For some reason which is unclear and which goes beyond the necessity to decide the case, before stating the above analysis the opinion tilts at the windmill of static conditions versus acts or activities, the first part of the *Scheibel* two-stage rule prohibiting affirmative injury. The suggestion is made that the parking of the car the previous evening may have been an act or activity in relation to the visit of plaintiff. This approach would leave the remoteness of an act as a question for the jury to consider in applying what would become the non-rule of *Scheibel.*

Chief Justice Taft, Justice O'Neill and Judge Leach (of the Tenth District Court of Appeals, sitting on assignment for Justice Herbert) did not concur in the opinion of the Court; they joined in both the syllabus and judgment. Although Justice Schneider had three other votes for his opinion with the static-active discussion, his argument that the *Scheibel* guest category (as well as those of licensee and invitee) should be totally ignored was relegated to a footnote.[210]

Municipal Immunity.—Ohio municipalities have long enjoyed immu-

[209] 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969).

[210] *Id.* at 131, n.2, 247 N.E.2d at 736, n.2.

nity from tort liability for damages caused in the performance of a "governmental" function.[211] Such functions are in theory distinguished from "proprietary," "ministerial" or "private" activities of a municipal corporation. Despite repeated attacks on this dual structure[212] the distinction has survived in Ohio and a decreasing majority of other states, and it escaped destruction once again during the 1969 term in *Fankhauser v. Mansfield*.[213]

Municipalities operate as an extension of sovereign powers. But in those areas where they engage in operations which may be performed by private persons or corporations, or where they earn a profit, they are usually considered to assume private liabilities. A recurring problem is classification of the activity in a given case. *Fankhauser* also failed to confront that problem by assuming the maintenance of an overhead traffic light to be a governmental function.

In the absence of judicial activism, the only liability for a governmental function is that to which the sovereign consents. Since the state can control municipalities through general law,[214] the General Assembly can provide for tort liability in those cases where it sees fit. There is no statute waiving immunity for mere negligence, but section 723.01, Revised Code, does require municipal corporations to keep streets, sidewalks, bridges and public grounds under their supervision "open, in repair, and free from nuisance." That section has been held to create civil liability in damages for the maintenance of a nuisance.[215]

The question in *Fankhauser* resolved into whether the failure of the city to repair or take other safety precautions within a reasonable time after notice of a defective overhead traffic signal at a street intersection amounted to the maintenance of a nuisance within the meaning of section 723.01. It is obvious that if the governmental immunity is to be recognized the only way to judicially expand liability in appropriate cases is to construe that section liberally.

The Court did noticeably loosen its construction in *Fankhauser*. The recent decision in *Gabris v. Blake*[216] had limited the statute to conditions

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211 From 1854 to 1919 (City of Dayton v. Pease, 4 Ohio St. 80 [1854]; Fowler, Adm'x., v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 [1919]; *overruling* Frederick, Adm'x., v. City of Columbus, 58 Ohio St. 538, 51 N.E. 35 [1898]) and from 1922 to the present (Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 [1922]; Broughton v. Cleveland, 161 Ohio St. 29, 146 N.E.2d 301 [1957]).

212 *See* concurring opinion of Gibson, J., in Hack v. Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963).

213 "The experience our courts have had with the segregation of municipal activities into governmental and proprietary categories has been awkward . . . . However, the resolution of the instant cases does not require us to take up the governmental or proprietary gauntlet." 19 Ohio St. 2d 102, —, 249 N.E.2d 789, 792 (1969).

214 OHIO CONST. art. XVIII, § 3.

215 Gaines v. Village of Wyoming, 147 Ohio St. 491, 72 N.E.2d 369 (1947).

216 9 Ohio St. 2d 71, 223 N.E.2d 597 (1967).

on or in a street. In order to bring an overhead light within that definition the opinion of Justice Duncan rejected *Tolliver v. Newark*,[217] in which a stop sign alongside the street was held not within the statute, and great reliance was placed upon the first paragraph of the syllabus in *Yackee v. Napoleon*.[218] That syllabus interpreted the predecessor of section 723.01 to hold that a municipality's duty " . . . to keep its streets open, in repair and free from nuisance, extends to structures or conditions located not only upon but above the surface of such streets . . . ." The structure referred to was a viaduct, and that syllabus statement was misleading in its broadness because viaducts are specifically provided for in the statute itself. Thus, this was dubious authority.

The opinion, particularly in its reference to a Michigan decision,[219] seems to rely not only upon the existence of a nuisance but also that the governmental activity itself (installation of a light) created the condition permitting the nuisance. The issue naturally suggested is whether powers to "regulate the use" and "care, supervision, and control" of streets imposes the obligation upon municipalities in the statute to correct nuisances not of their own making. This term the Court allowed a motion to certify a case involving a low-hanging tree limb, without any allegation that the city had planted the tree.[220] Although the syllabus in *Fankhauser* did not mention the element of establishment, and as written would support a reversal in the tree limb case, the principle is still another step from *Tolliver*.

The tenor of the opinion of the Court is clear. Immunity is on the defensive. The problem is how far a single statute will stretch. Perhaps an outright decision, such as was necessary for charitable immunities,[221] is inevitable.

F. *Motor Vehicles*

Assured Clear Distance Ahead.—In *Pallini v. Dankowski*[222] the Court continued to construe narrowly the phrase "assured clear distance ahead" as it is used in section 4511.21, Revised Code.

Defendant's car was proceeding southbound in the inside lane of a four-lane, two-way street around dusk. Plaintiff alighted from a stopped car at the easterly curb, proceeded to the crosswalk, and began to cross the street. The evidence in the case indicated that defendant could have seen plaintiff at the time she stepped into the street, and by reacting at that

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217 145 Ohio St. 517, 62 N.E.2d 357 (1945).

218 135 Ohio St. 344, 21 N.E.2d 111 (1939).

219 O'Hare v. Detroit, 362 Mich. 19, 106 N.W.2d 538 (1960).

220 Robert Neff & Sons, Inc. v. City of Lancaster, No. 69-62 (Ohio Sup. Ct., April 9, 1969).

221 Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

222 17 Ohio St. 2d 51, 245 N.E.2d 353 (1969).

moment could have stopped his car before it reached the point where their perpendicular paths crossed. Plaintiff moved rapidly across the street and proceeded to literally run into the front left fender of defendant's car.

The argument made by plaintiff was that the trial court should have charged in these circumstances on the issue of defendant's violation of the assured clear distance ahead statute. The Court, in an opinion by Justice Thomas Herbert, insisted that the statute applies only to an object within the path or lane of travel of the vehicle. The fact than an object which is moving towards the lane of travel may be within the peripheral vision of the driver of the vehicle is irrelevant for purposes of an alleged violation of this statute.

Authority of Registrar Under Financial Responsibility Law.—Toledo v. Bernoir[223] confirmed the broad discretion assumed by the Registrar of Motor Vehicles in enforcing Ohio's financial responsibility law.[224] The Court held that following the filing of an accident report involving a motor vehicle, the registrar may determine the amount of any reasonably possible recovery for injury or damage and, if there is no policy of insurance which is applicable, require both the driver and the owner to post sufficient security or have their licenses and automobile registration suspended.

This holding of the Court indicates a possible choice between two theories explaining Ohio's non-compulsory insurance law. The purpose of having any law to encourage or require motor vehicle insurance is obvious, to assure compensation for innocent parties whose person or property is damaged by the operation of a vehicle. But the reason for the one-free-shot aspect of Ohio's statute is not as obvious. On the one hand a vehicle which causes injury should be backed by a fund sufficient to pay the injured party; but other states have had no difficulty in using this theory to require proof of insurance in order to initially register a car and not only after the first accident.[225] On the other hand, a driver who has demonstrated a proclivity to cause an accident should be removed from the road as a proven greater probable hazard or thereafter be forced to demonstrate financial resources sufficient to make right past and future wrongs. The latter theory would seem to justify the application of the statute only to the driver of a car, or to an owner if the driver was operating under his direction or the cause of the accident was otherwise attributable to the owner. That reading of the statutory language was specifically rejected by Justice Schneider's opinion.

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[223] 18 Ohio St 2.d 94, 247 N.E.2d 740 (1969).

[224] OHIO REV. CODE ANN. § 4509 (Page 1965).

[225] *E.g.*, Massachusetts. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

G. *Contracts*

Public Construction Bids.—State construction contracts must generally be awarded to "the lowest and best bidder" on any project, and this is the standard for community college districts.[226] In *Weiner v. Cuyahoga Community College Dist.*,[227] the Court read into the word "best" a permissible, if not necessary, element of public policy going beyond the economies and quality of the construction involved. That interpretation opened the door wide for the interjection of multiple political issues into all future public works.

The Cleveland campus of the Cuyahoga Community College is financed with a combination of state capital improvement funds and federal urban renewal land purchases. As such it is classified as a federally assisted project. The low bidder for the heating, ventilating and air-conditioning phase of the construction was a contractor with an exclusive union hiring hall contract. The bid advertisement required the successful bidder to submit an affirmative action plan which will "have the result of assuring that there is minority group representation in all trades on the job and in all phases of the work." The low bidder agreed to this obligation insofar as it forbade his discrimination in employment practices and working conditions and required him to exert good-faith efforts to obtain available minority employees. However, the college and federal officials insisted that a plan drawn in these terms was unacceptable and nothing short of a commitment of actual minority employment on the job would suffice. Thus, a deletion of limitations in the plan to availability, with the reservation that "this company cannot and, therefore, does not guarantee that it will have Negro apprentices on this project," was determined by the defendants to fall short of the bid specification requirement of "assuring" minority representation.

The facts of the case placed defendants in an uncomfortable position. Chief Justice Taft's dissent points out that they admitted, as the majority of the Court was also forced to conclude, that an insistence upon a "guarantee" of racial hiring (either as a token or a quota) would violate the Civil Rights Act of 1964.[228] It should also run afoul of the commerce clause of the constitution as a restriction upon the free movement of labor in interstate commerce.

The only qualification upon the low bidder's assurance which remained

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[226] OHIO REV. CODE ANN. § 3354.16 (Page Supp. 1968).

[227] 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969).

[228] 42 U.S.C. § 2000e-2(j) (1964). This was also the conclusion reached in Opinion No. B-163026 of the Comptroller General of the United States on August 5, 1969, disputing the legality of the "Philadelphia Plan" announced by the Assistant Secretary for Wage and Labor Standards, Department of Labor, on June 27, 1969. The Solicitor's memorandum relied upon by the Department of Labor (and supported by the Department of Justice) cites the *Weiner* case as it principal judicial authority.

at the final rejection of its bid was the phrase rejecting a guarantee, quoted above. Since that rejection is an admitted legal truism, it is difficult to understand what justifiable basis the defendants had for the conclusion that the bidder's assurance was equivocal. This fence straddling is especially precarious in the light of the Court's recognition that the "plaintiff does not question the requirement that public contractors promise not to discriminate in employment," and that the plaintiff's "submitted Affirmative Action Plan reflected the company's equal opportunity employment practices." The opinion of Justice Herbert retreated to the only tenable ground on which the judgment could be supported, namely the limited scope of review on questions of fact.

If the good intentions of the bidder are not in issue, the only complaint that any of the defendants may rely upon is the bidder's exclusive hiring contract. The Court did not attempt to resolve the inherent conflict between the federal policies expressed in the National Labor Relations Act[229] encouraging such union contracts[230] and the reverse-discrimination policies established by Presidential Executive Order No. 11246 (as interpreted and applied by the Office of Federal Contract Compliance). The failure to pursue union discrimination at its source has left union employers caught between policies. In fact the federal government, as an attack on discriminatory unions, is engaged in what was once considered the reprehensible practice of a secondary boycott.

Real Estate Broker's Exclusive Contract.—The plaintiff in *King v. Dean*[231] was a real estate broker who had obtained an exclusive listing contract for the sale of defendants' home. The listing period was for three months with an extender clause of three months reserving a commission to plaintiff for a sale by anyone within the extension period to a person with whom plaintiff had "negotiated" during the original three month term. The plaintiff did show the house to several parties but did not even approach receiving a commitment to purchase, and the term expired. Thereafter, one of the couples which had been first shown the house by plaintiff sold their former home and purchased defendants' house from a different broker. This occurred two months after plaintiff's exclusive listing expiration, but he claimed a commission on the basis of the extension provision.

The Court, in an opinion by Chief Justice Taft, established a sound principle of agency law for Ohio. The syllabus denies the effect of the contract's benefits to the agent-broker where he did not communicate his efforts on behalf of the principals to them. Curiously, this proposition of law never appears to have been squarely confronted in Ohio, and seldom

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229 29 U.S.C. § 151 (1947).

230 29 U.S.C. § 158(f) (1959).

231 19 Ohio St. 2d 17, 249 N.E.2d 45 (1969).

elsewhere. But it seems an elemental requirement of fairness that, when the agent knew that by the terms of his contract the principal was free to engage others to perform the same functions, if there existed at that time any basis for a possible future compensation to the agent, he should warn the principal of this. Particularly is this so where the agent himself prepared or presented the contract.

In order to reach that proposition the Court skipped over the question of whether the case was properly submitted to the jury on the facts in the first place. The issue of the agent's breach of his duty under the contract disqualifying him from the extender benefit would not arise at all if there had never been any "negotiation" within the meaning of the contract. The Court of Appeals read that word to include even the most tentative exchange. It defined negotiation to require "a process of discussion whereby parties mutually interested seek to resolve differences with the purpose of arriving at agreement."[232]

The contract in question was executed on a printed form supplied by the plaintiff. The terms of the contract did not define the word "negotiated" as used therein to give it any meaning other than customary usage.[233] The normal rule of law should apply that ambiguities will be construed against the plaintiff in this circumstance.

The testimony of the plaintiff, which was relied upon as evidence that the plaintiff had "negotiated," did not satisfy the test stated by the Court of Appeals. Plaintiff testified that, after showing the house, the parties said to him that as soon as their home was sold "they would be interested." This statement, together with a question as to the probable sales price, amounted to a mere inquiry, not active bargaining, conditional or otherwise. It is difficult to understand how the Court of Appeals could derive from this brief conversation "discussion directed to the adjustment of differences." Even the most casual shopper, in the course of his rounds of touring houses for sale, would be interested in a professional's prediction of the eventual sales price. Such an expression of interest should not, as a matter of law, constitute a commencement of negotiation.

Rescission of Sale of Securities under Blue Sky Law.—The Ohio Securities Act[234] requires registration by description or qualification of non-exempt securities and registration by description of non-exempt securities transactions. Any sale or contract for sale of securities which should be registered under those provisions "is voidable at the election of the purchaser . . . unless the court determines that the violation did not materially affect the protection contemplated . . . ,"[235] where there was no registration.

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[232] 15 Ohio App. 2d 15, 238 N.E.2d 828 (1968).

[233] Smith v. Eliza Jennings Home, 176 Ohio St. 351, 355, 199 N.E.2d 733, 735-36 (1964).

[234] OHIO REV. CODE ANN. ch. 1707 (Page 1964).

[235] OHIO REV. CODE ANN. § 1707.43 (Page 1964).

During the 1969 term the Court put teeth into those provisions by sustaining a Court of Appeals decision allowing restitution to a plaintiff-purchaser who probably had knowledge of the realties of the transaction involved. Justice Brown's dissent in *Bronaugh v. R. & E. Dredging Co.*[236] complained that with this holding "form must prevail over substance." That is exactly the purpose of registration and disclosure statutes in the securities field. The Court's decision has the great merit of creating certainty by reducing the ambiguous defense (based upon the "materially affect the protection" phrase) to apply only in those cases of "a trivial nature."

The opinion also is valuable in construing the exemption of a transaction which "is not made in the course of repeated and successive transactions of a similar character."[237] That exemption was held not to apply where "several persons [nine] . . . were solicited at different times to subscribe to varying amounts of stock. . . ." A more narrow interpretation is hard to imagine, and this clearly puts the burden of establishing an exemption on the seller where it belongs. The principle has been fixed that a seller's good faith is not sufficient when he fails to register.

Justice Brown further complains that "[t]he result of the majority opinion in this case is to refund the investment of one who makes no complaint except loss of investment. . . ."[238] But that is the beauty of the system: a seller of securities, who does not register and is not exempt, is an insurer of the buyer's investment, and the buyer is thereby motivated to privately enforce the law which was enacted to protect persons in his position.

Antenuptial Agreement.—The plaintiff in *Osborn v. Osborn*[239] was, at the time of her marriage, 54 years of age. Her fiance was a 77 year old widower. Both parties had substantial means, although his were greater than hers, and both had children by previous marriages. The prospective husband was a resident of Cleveland, but also had a home in Massachusetts, while the prospective wife was a resident of Massachusetts. In contemplation of their marriage the two parties agreed to maintain their separate properties for their separate families, and (in spite of the fertile octogenarian rule) no issue were contemplated in their forthcoming marriage (and none were produced).

The decedent had had the antenuptial agreement drawn by his Cleveland counsel. This was then given to plaintiff's Massachusetts lawyer who advised on its validity under Massachusetts law. After that consultation both parties executed the agreement approximately four weeks before their marriage, both of which occurred in Massachusetts. The couple moved to Cleveland and resided there and in Florida. Following dece-

[236] 16 Ohio St. 2d 35, 242 N.E.2d 572 (1969).

[237] OHIO REV. CODE ANN. § 1707.03 (B) (Page 1964).

[238] 16 Ohio St. 2d at 41, 242 N.E.2d at 576.

[239] 19 Ohio St. 2d 144, 248 N.E.2d 191 (1969).

dent's death almost six years later, plaintiff then sought to have the agreement set aside and take the wife's distributive share of his estate.

There was a dual issue before the Court: (1) choice of law, and (2) whether the antenuptial agreement was valid under the applicable law. The two jurisdictions in question were Ohio and Massachusetts. The plaintiff-wife's attack upon the validity of the agreement rested primarily on ignorance of the extent of decedent's wealth, and Massachusetts law does not require disclosure.[240] It is true that the Massachusetts cases involve situations where the agreement made some provision for the wife by its terms, but here the wife's independent means were sufficient to support her. The plaintiff's best chance was therefore to persuade the Court to reject the place-of-contract conflicts rule, and if successful to urge an extension of the case of *Juhasz v. Juhasz*[241] where the Court announced the standard that an antenuptial agreement is invalid, in the absence of disclosure or knowledge of assets, if "in the light of all surrounding circumstances" the provision for the wife is disproportionate to the husband's property.

The Court ignored the conflicts question and proceeded to decide the case on Ohio law against the plaintiff. The "fairness" test of *Juhasz* was distinguished on the facts and by implication limited to those cases where the wife has no personal estate and is forced to depend on her husband for support. By relying upon *Troha v. Sneller*,[242] where the syllabus supporting an antenuptial agreement's validity turned only on "each [prospective spouse] owning a substantial amount of property and each having grown children by prior marriages," the Court has recognized one rule for those less well endowed where the law will extend its protection and another for those who do not require it. One may only speculate as to whether *Juhasz* would be further restricted in a case where one of the parties owned only a small amount of property, there was no disclosure of the other party's substantial worth, but the former was well aware of the purposes of the agreement and the latter did not affirmatively deceive. This is at least suggested by the *Osborn* opinion's recital of the *Juhasz* facts which showed a serious disability in the wife's comprehension of what she was signing, not simply a failure to realize the monetary loss she would suffer.

H. *Estates, Wills and Trusts*

Parties to Exceptions to Inventory.—In November, 1968 the Court heard oral argument on the merits in *Cole v. Ottawa Home and Savings Assn.*[243] In January, 1969, following the retirement of Justice Paul Her-

[240] Wellington v. Rugg, 243 Mass. 30, 136 N.E 831 (1922).

[241] 134 Ohio St. 257, 16 N.E.2d 328 (1938).

[242] 169 Ohio St. 397, 159 N.E.2d 899 (1959).

[243] 18 Ohio St. 2d 1, 246 N.E.2d 542 (1969).

bert and the resignation of Justice Brown, the Court considered *In re Estate of Marsek*.[244] These two cases were consolidated in a single opinion with a unanimous Court, 5-0 in the former and 7-0 in the latter. The common issues decided in those two cases were (1) who are the parties to a hearing on exceptions to an inventory in the probate of an estate, and (2) what persons are bound by the determinations of the Probate Court in such a hearing?

In the ordinary course of estate administration the executor files an inventory with the Probate Court pursuant to section 2115.15, Revised Code. Exceptions may be filed to the inventory "by any person interested in the estate or in any of the property included in the inventory." Following the filing of exceptions, only the executor or administrator must be notified; others may or may not receive notice.

Each of the cases before the Court involved exceptions alleging that, among other items, joint and survivorship bank accounts in which the deceased had an interest should have been included as assets in the estate inventory. In the *Cole case* the account survivor was not the estate executor. In *Marsek* the accounts had two survivors, one of them the executrix and the other her sister. The Court held that in *Cole* the account survivor, not otherwise a party to the hearing on exceptions, did not become a party by reason of notice that a hearing would be held, and not having voluntarily appeared was not bound by the Court's determinations as to the account; therefore, her action against the bank upon the account contract was not barred by *res judicata* from the exceptions proceeding.

In *Marsek* the executrix, although admittedly maintaining two legal capacities (namely, executrix on the one hand and account survivor on the other) was bound by her participation as a party to the Probate Court hearing, while her sister was not so bound and could attack the Court's determination in a separate action.

The banks involved, literally caught in the middle, have two methods of recourse for self protection. First, section 1107.08, Revised Code, allows the bank to pay the survivor of the account. Second, a bank may file a declaratory judgment action joining all of the interested parties.[245] The one action which such a bank should not take, it unfortunately being the most obvious response to the problem, is to obey the order of the Probate Court and pay the account balance to the Court for inclusion in the estate.

It is at first disturbing that in the *Marsek* situation two account survivors, presumably in an identical position in relation to that account, may obtain different rights to the property in the account. This is a necessary possibility since the Probate Court judgment binds the executrix-sur-

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[244] *Id.*

[245] OHIO REV. CODE ANN. § 2721.02 (Page 1953); 18 Ohio St. 2d at 8, 246 N.E.2d at 544.

vivor as to her share of the account, while the other survivor may bring an action against the bank upon its contract or defend a declaratory judgment action by the bank or an action on behalf of the estate brought by the executrix, without the intervention of *res judicata*. But it must be recognized that this is a consequence, not of the survivors' contractual relationship with the bank, but of their distinct relationships to the estate. The bank, as long as it proceeds properly, has no risk of double liability. The final result is merely that the account is distributed after each survivor has had his day in court, although these may be separate days. When there are multiple survivors to an account, or multiple claimants to any property which is the subject of an exception to an estate inventory, any and each of them may voluntarily submit to the jurisdiction of the Probate Court, participating there as parties and being bound by that determination. However, no claimant should be obligated by the defense offered by another and in which he was not required to join.

Proper Party to Will Contest.—The *Cole case* discussed above showed the Court to be unsympathetic to executors maintaining another legal capacity adverse to the interests of the estate.[246] In *Steinberg v. Central Trust Co.*[247] the Court exercised an opportunity to prohibit such a conflict of interest.

Decedent in *Steinberg* died testate leaving a daughter and two granddaughters. The daughter, decedent's only heir at law, was named coexecutor with the Central Trust Co. which also served as sole trustee under the will's provisions. The two granddaughters' only interest in the estate was as remaindermen of the life estate devised to their mother.

Following the admission of the will to probate, decedent's daughter qualified and accepted appointment as coexecutor. As sole heir at law she would have taken the entire estate outright, not subject to trust or only for life without powers of appointment, had the will been set aside. *Allison v. Allison*,[248] decided by the Court last term, had indicated that an executor with an interest in challenging the will may only do so after resignation. This raises two problems for the executor who has already been appointed. First, the resignation may result in a taxable gift of the executor's fee to the other devisees and legatees if the will is upheld. And second, if the will contest is unsuccessful the other coexecutor (or if there is none,

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[246] In this same spirit the Court also held during the 1969 term that, where the Probate Court elects on behalf of an incompetent spouse to take against the will of a deceased instead of under the will, the executor of the deceased's will, the trustee of deceased's testamentary trust, and legatees of the will all have no standing to challenge the election because of their potentially adverse interests versus the surviving spouse. Only the guardian of such spouse may contest an election, and that would be on the ground that the court failed to choose the "better" provision in the exercise of its discretion. *In re* Estate of Cook, 19 Ohio St. 2d 121, 249 N.E.2d 799 (1969).

[247] 18 Ohio St. 2d 33, 247 N.E.2d 303 (1969).

[248] 15 Ohio St. 2d 44, 238 N.E.2d 768 (1968).

the administrator) will be left with complete control of the proceedings, and often this will be someone outside the family.

Obviously in order to circumvent these and other handicaps, the daughter-coexecutor did not follow the *Allison* delineated procedure. Instead an action was conveniently brought in the name of her daughter, the decedent's granddaughter, and the daughter-coexecutor as nominal defendant answered but joined in the prayer of the petition to set the will aside. Fortunately for the preservation of an adversary proceeding, codefendant Central Trust Co. demurred to the petition on the ground that the plaintiff granddaughter was not a proper party to contest the will. The appeal came to the Court from the sustained demurrer.

Will contests are governed by section 2741.01, Revised Code, which authorizes any "person interested in a will" to challenge its validity. That language has been limited by judicial construction to pecuniary interests.[249] This interpretation guarantees the integrity of probate, fosters confidence in testators, and prevents extensive litigation by persons whose status quo would not be affected by the validity or invalidity of the will. But the rule also requires that the pecuniary interest of the plaintiff be one which is adversely affected by the probate of the will.[250] In effect this would normally consist of only that class of heirs at law for whom the provisions in the will are less than their intestate share. Also, since the limitation of contestors turns on pecuniary interest, presumably an heir at law who would take a different type of devise under the will, than as his share under the statute for intestate distribution,[251] will be barred as a contest plaintiff unless he is able to establish a greater present value for his interest at law.[252]

In anticipation of this holding appellants argued in the alternative that the answer filed by defendant-coexecutor should be treated as a cross-petition seeking the same relief since it admitted all the allegations of the petition and joined in the prayer. Despite the prevalent practice of separately denominating a cross-petition in an answer in Ohio, the statutes do not so require.[253] With no formal bar to this construction of the pleadings the Court had to dispose of the claim on *Allison* grounds. Treating the coexecutor as plaintiff, *Allison* covers the *Steinberg* case, but the Court

[249] Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364 (1918).

[250] *Id. Compare* Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604 (1908); and Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928); *with* Comer v. Comer, 175 Ohio St. 313, 194 N.E.2d 572 (1963).

[251] OHIO REV. CODE ANN. § 2105.06 (Page 1968).

[252] This theory is supported by other decisions which have required the Probate Court, in electing whether an incompetent surviving spouse of a testate decedent should take under or against the will, to choose as the "better" pursuant to section 2107.45, Revised Code, the higher net value as computed without regard to other factors such as age of survivor, type of bequest, need, or other family interests. *In re* Strauch, 11 Ohio App. 2d 173, 229 N.E.2d 95 (1967), *aff'd on other grounds*, 15 Ohio St. 2d 192, 239 N.E.2d 43 (1968).

[253] OHIO REV. CODE ANN. § 2309.13 (Page 1953).

states that it is extending the *Allison* rule.[254] This is misleading since the rule of fiduciary duty enunciated is identical; the only change which may be considered an extension of the former case is the effect on the judgment since in *Allison* the executor was given an opportunity to resign and proceed upon remand. In *Steinberg* final judgment was entered affirming the lower courts and sustaining the demurrer. Justice Schneider dissented from an otherwise unanimous Court in this application of *Allison*, as well as from the rule itself as stated in the syllabus.[255]

Premarital Conveyance of Real Property.—Perlberg v. Perlberg[256] brought the Court to reconsider this term its decision of seventy years ago in *Ward v. Ward*.[257] The common issue was whether the conveyance in contemplation of marriage by an engaged grantor of his real property to children of a former marriage without adequate consideration other than love and affection is a fraud upon the marriage and the unwitting prospective spouse's right to dower as a matter of law. *Ward* held that it was. *Perlberg* noted the valid distinction that the *Ward* deed, executed before marriage but filed thereafter, was not record notice as was the deed in *Perlberg* which was filed the day before the wedding, but it went further and expressly overruled *Ward*.

The Court significantly stated that "[i]f evidence is adduced in the requisite quantum that a betrothed woman has been the victim of *actual fraud*, her cause of action to set aside such a fraudulent conveyance will lie."[258] Although it went on to say that the record "contains no such evidence," this should have been phrased as an affirmance of the Court of Common Pleas which found no facts amounting to actual fraud. The record is unclear: on the one hand there is testimony that the engaged grantor intentionally took the plaintiff fiance to view his real estate holdings, while on the other hand there is evidence this may have been only to obtain a loan from her, and this latter theory is buttressed by evidence of "family meetings" at which the transfers of the title were discussed. The practical result is that an action to set aside such conveyances will depend on affirmative deception, and the findings of fact in this regard will control. Nonetheless, parties to a prospective marriage with peculiar property dispositions, particularly when one or both are of advanced age or substantial means, will be well-advised to execute an antenuptial agreement to establish firm evidence of disclosure.

It is interesting to speculate on one prominent factor in Justice Duncan's opinion. Perhaps as an accident, the four blatant overrulings of prior Court decisions were in candid opinions by the Court's junior mem-

254 18 Ohio St. 2d at 36, 247 N.E.2d at 305.

255 He also dissented with an opinion in *Allison*.

256 18 Ohio St. 2d 55, 247 N.E.2d 306 (1969).

257 63 Ohio St. 125, 57 N.E. 1095 (1900).

258 18 Ohio St. 2d at 59, 247 N.E.2d at 308 [emphasis added].

ber. *Perlberg* states the reason as follows: " . . . we do not believe that *Ward v. Ward, supra*, provides a reasonable rule for our time." He approaches the rejection of a very recent case in *Carmelite Sisters*[259] in a similar fashion, and again in *Fankhauser v. Mansfield*.[260]

Mental Hospital Expenses of Beneficiary.—The only trust case before the Court this term presented an unusual fact situation. The beneficiary of a discretionary trust for support was an otherwise destitute mental patient at a state hospital. There her needs consisting of room, board and care were supplied by the state. The trustees concluded that her maintenance had been otherwise provided for, and the income from her share of the estate was attributed to the other shares. The Department of Mental Hygiene and Correction brought an action for reimbursement, and a unanimous Court in *Bureau of Support v. Kreitzer*[261] affirmed a judgment in the state's favor.

The state was found to be in the position of a supplier of necessities. Such a person has often been recognized to have an enforceable claim against a spendthrift trust or a trust for support which other creditors or the beneficiary himself could not reach.[262]

The principal difficulty encountered by Justice Schneider in reaching that conclusion was obscured by his structure of the opinion. He divided it into three sections, and sections I and III are not perfect complements. Section III attempts to clinch its argument that the state is a supplier of necessities by citing its duty to perform this function; "[i]t is, therefore, no volunteer."[263] But this has the effect of indirectly tarnishing the gloss of section I where the conclusion is that "[w]hatever may be the nature of the liability of the state to a patient with dependents, we have no difficulty in arriving at the conclusion that in the case of one without dependents . . . the state's liability is secondary. . . ."[264] The circle, which the subtitle of section III ("The Resolution of the Impasse") implies is broken, remains.

Survival Statute.—The Court's first estates and wills decision of the term is exemplary of the usual function which the Court is relied upon to perform. Since 1953 there had been an uncertainty in the law of Ohio regarding the necessary period of survivorship in order to qualify as an heir at law or legatee of a decedent.

Justice Herbert's opinion in *Henry v. Central Nat'l Bank*[265] points out

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259 Discussed *infra* at section (N).

260 Discussed *supra* at section E. *See also* Ziegler v. Ohio Water Svc. Co., 18 Ohio St. 2d 101, 247 N.E.2d 728 (1969), discussed *infra* at section M.

261 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968).

262 2 A. SCOTT, THE LAW OF TRUSTS § 157.2 at 1216-20 (3d ed. 1968).

263 16 Ohio St. 2d at 152, 243 N.E.2d at 86.

264 *Id.* at 149, 243 N.E.2d at 85.

265 16 Ohio St. 2d 16, 242 N.E.2d 342 (1968).

that the statutory confusion originated in what was one of the most important legislative sessions of recent years, the 100th General Assembly, which considered the adoption of the Revised Code. He also documents the principle which was essential to the passage of the long-awaited recodification: no substantive changes in the statutes were to be incorporated. Any actual amendment of a statutory provision required a separate bill in the same session.

This complication in a state which has a woeful neglect of legislative history would be disturbing enough alone, but there was another facet. The Bureau of Code Revision had inadvertently omitted part of section 10503-18, General Code, in its conversion to section 2105.21, Revised Code. To correct this and similar discrepancies in other sections the Omnibus Bill[266] was introduced, passed on August 7, and signed on August 12; and it became effective October 1 (the same date as the Revised Code). That section required an heir or legatee to survive a decedent by three days to avoid a conclusive presumption that he had pre-deceased the decedent.

In that same session a substantive amendment was introduced to extend the survival period from three to 30 days.[267] This was passed on July 9, signed on July 17, and became effective October 16 (the normal constitutional period of 90 days, there being no emergency clause as in the Omnibus Bill).

Thus, the problem arose with the ordinary rule of statutory construction, namely that the later in time of two conflicting enactments prevails, in conflict with the only sensible application of the several bills. Actually, the Court could have applied this general principle and concluded that "later in time" refers to the later effective date, rather than the later date of enactment. That may have been the theory of Chief Justice Taft and Justice Schneider who concurred only in the fourth paragraph of the syllabus and the judgment. But Justice Herbert, with four other members of the Court concurring generally, elaborated at great length in both the syllabus and opinion on the necessity to allow exceptions where reasonableness so requires.

The conclusion reached was the only rational one possible: the Omnibus Bill purported to correct all errors in the code revision, and in this enthusiasm had the effect of clarifying only the interim between October 1 and October 16 for purposes of section 2105.21, Revised Code, because of the additional amendment of that section. However, the Court of Appeals had managed to reach the opposite result,[268] and perhaps to demonstrate to lower courts that they need not blindly follow general principles

[266] S.B. 361.

[267] Amended S.B. 40.

[268] Although Baldwin's Ohio Revised Code lists only the version of the section enacted in Amended S.B. 40, Page's Ohio Revised Code Annotated for 1967 sets forth both versions and

which lead to absurd determinations, the majority opinion was written in terms of interpreting "legislative intention."

I. *Private Associations*

Bowling.—This term the Court was presented for the first time the question of judicial review of the actions of private associations. The first case to be decided was that of *Lough v. Varsity Bowl, Inc.*,[269] and it involved an action filed by the participants in an American Bowling Congress tournament. The A.B.C. is a voluntary association which sanctioned the tournament involved and provided the rules and constitution regulating tournament operation. By entering the bowling tournament, the participants became subject to the rules and procedures of the A.B.C.

The Court decided the case upon the traditional rule, which it stated in its syllabus, as follows: "Where the rules of a voluntary association provide for the final settlement of disputes among its members, its action thereunder will not be reviewed by the courts, in the absence of allegations of arbitrariness, fraud, or collusion, even though property rights may be involved."[270] The only contribution of the Court to the interpretation of this rule was that the fact of an effect on property rights will not automatically vest a court with jurisdiction. When viewed in the light of the facts presented in the *Lough case* this proposition is not startling. Here, the property involved was the prize money offered to the winner of the tournament in question. It should not be surprising that, if an association may validly establish its own rules and procedures for internal operation which govern both the association and the membership, the award of a prize by that association or on its behalf should be governed by the established rules, and a dispute as to the application of those rules should be decided within the appellate framework of the association.

Churches.—On January 17, 1968 the Court overruled a motion to certify the case of *Serbian Orthodox Church Congregation of St. Demetrius of Akron, Ohio v. Vladislav Kelemen.*[271] That appeal involved a dispute over the right to control church property following a schismatic split in the church hierarchy. As stated in the opinion of the Court of Common Pleas by Matz, J., "The issue joined by these pleadings is whether or not the plaintiffs and their associates constitute the St. Demetrius Church or whether the defendants and their associates constitute such church. That there is a schism of the church is quite apparent from the evidence. The plaintiffs and their associates claim that plaintiff church is an integral

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explains the legislative history, allowing the reader to choose which version he believes to be correct, with the warning that the *Henry* case is pending before the Court.

269 16 Ohio St. 2d 153, 243 N.E.2d 61 (1968).

270 *Id.*

271 Case No. 41380.

part of the original diocese in the United States of North America and Canada, and that the defendants and their associates are the schismatic group. The defendants, on the other hand, claim that the Serbian Eastern Orthodox Church with its see in Belgrade, Yugoslavia, is the head of the church and that they and their associates constitute the true church belonging to the hierarchy with its see in Belgrade."

This case was remanded to the Supreme Court of Ohio by the Supreme Court of the United States[272] on February 24, 1969 for consideration in the light of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.[273] On March 5, 1969 the Supreme Court of Ohio allowed the motion to certify the record, pursuant to the order of the Supreme Court of the United States. This case was not argued on the merits during the 1969 term.

The *Presbyterian Church* case arose when two local churches withdrew from an acknowledged hierarchical general church organization, the Presbyterian Church in the United States. As reported in the opinion of the Supreme Court of the United States, Georgia law made the right to the property previously used by the local churches "turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it."[274] The Supreme Court of the United States reversed the Supreme Court of Georgia and held that the First and Fourteenth Amendments to the Constitution of the United States prohibited a civil court from making its determinations on the basis of church doctrine and dogma. While this appears to be a sound principle of constitutional law, the Court failed to suggest any valid criteria which could be used to determine church property disputes, an emotional issue but one which is of necessity litigated at least as to property rights.

On remand the Supreme Court of Ohio will be faced with an impossible situation. It will be precluded from considering any of the ecclesiastical factors which dominate the views of the litigants. The *Presbyterian Church* case seems somewhat easier to resolve. There the local churches were admittedly withdrawing from an acknowledged superior organization. As former members of the denomination these churches could be said to have submitted themselves to the organization's constitution and internal procedures. In order to validly withdraw, they would have to pursue their remedy within the private framework. However, in the *Serbian Orthodox* case the plaintiffs deny their association with the hierarchy represented by defendants. Thus, they refuse to recognize the authority of any private association other than their own.

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272 393 U.S. 527 (1969).

273 393 U.S. 440 (1969).

274 *Id.* at 441.

J. *Jurisdiction*

Long-arm Statute.—In *Kilbreath v. Rudy*[275] the Court considered the retroactive effect of Ohio's "long-arm" statutes[276] upon actions accruing before the statutes' effective date in 1965 but filed thereafter. The appellant in *Kilbreath* argued against retroactive applicability on three grounds: (1) that this was barred by Section 28, Article II of the Ohio Constitution, (2) that this was prohibited by section 1.20, Revised Code, and (3) that the statutes are analogous to those nonresident motorist statutes which were held to be prospective.

The Court distinguished the prohibitions in the Constitution and the statute as applying only to those laws affecting "substantive rights, and [having] no reference to laws of a remedial nature providing rules of practice, courses of procedure, or methods of review."[277] Paragraph three of the syllabus in the case characterizes the long-arm statutes as expanding the personal jurisdiction of the courts, and therefore as "remedial," but does not suggest whether they are "rules of practice, courses of procedure, or methods of review." It is apparent that the Court concluded that any statute which might be classified as remedial is, by that definition, not substantive.

The remedial label was derived from the Court's observation that the statutes "do not create new wrongs, they merely let local courts reach farther for personal jurisdiction over those who have committed established wrongs."[278] But this overlooks the more well-reasoned analysis exemplified by an Ohio Court of Common Pleas considering the same problem:

> Although a "long-arm statute" does not affect vested rights, it makes such a profound change in established law concerning jurisdiction, venue and service of summons upon non-residents that it must be considered at least partially substantive and will not be construed as having retrospective application in the absence of an express statement of legislative intention to that effect.[279]

The Supreme Court felt that the appellant could only be relying upon its absence from the local jurisdiction, and "this kind of reliance does not seem worthy of judicial protection."[280] With the demise of the doctrine of *Pennoyer v. Neff*[281] the Court no longer felt obligated to honor what it viewed as legal gamesmanship over jurisdiction which hindered the claims of Ohio plaintiffs. What it failed to recognize was that decisions of the

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275 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968).

276 OHIO REV. CODE ANN. §§ 2307.382-.383 (Page Supp. 1968).

277 16 Ohio St. 2d at 72, 242 N.E.2d at 660.

278 *Id.*

279 Paragraph 7 of syllabus in Bruney v. Little, 8 Ohio Misc. 393 (1966).

280 16 Ohio St. 2d at 73, 242 N.E.2d at 660.

281 95 U.S. 714 (1877).

Supreme Court of the United States expanding state jurisdiction[282] emphasized that an element of gaming remains involved in the commencement of any law suit and that due process requires respect for "traditional notions of fair play and substantial justice."[283] Although Ohio may constitutionally expand its jurisdiction and provide for service of process upon non-residents falling within that expanded jurisdiction, it does not seem fundamentally fair to incorporate into this group those persons who had done business previously in Ohio under conditions where no law provided that they would have to engage in legal actions in Ohio courts. Any wrongs committed by such persons could then, as well as now, be litigated in other forums.

The prospective application of nonresident motorist statutes was distinguished by the Court on the issue of the fictional agency of the Secretary of State, and the reasoning that under *Pennoyer v. Neff* he could only be "designated" by a motorist's future presence within the state. Although it is indisputable that contrived technicalities of statutory agency for service have been replaced with schemes more likely to achieve actual notice to a defendant, and this is constitutionally valid because the contacts of the motorist with the state subsequent to the enactment of the statute create local jurisdiction and put him on notice, the expansion of jurisdiction and modernization of techniques of service, in and of themselves, in no way justify their application to persons acting before the legislative enunciation.

Chief Justice Taft, in his dissent, preferred to attack retroactive application of the long-arm statutes upon the theory that section 1.20, Revised Code, applied. Unfortunately, he did not see fit to explain his reasoning in reaching that conclusion, and the position of the Court seems justified to the effect that this statute applies only to amendments and repeals, while Ohio's long-arm statutes are an addition to the statutory law rather than a change.

K. *Territorial Disputes*

School Districts.—In *State ex rel. Erwin v. Board of Education*[284] the Court considered a conflict between the statute providing for transfer of a local school district's territory to a city school district[285] and that providing for the creation of a new local school district.[286] The county board of education adopted a resolution pursuant to section 3311.26, Revised Code, proposing the creation of a new local school district consisting of the old

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[282] International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958).

[283] 326 U.S. at 316.

[284] 17 Ohio St. 2d 63, 245 N.E.2d 730 (1969).

[285] OHIO REV. CODE ANN. § 3311.231 (Page Supp. 1967).

[286] OHIO REV. CODE ANN. § 3311.26 (Page Supp. 1967).

Bloomfield Local School District and two others. That section provides that the consolidation would become automatically effective on the thirtieth day after the adoption of the resolution, unless a petition of referendum was filed containing the signatures of thirty-five percent of the qualified electors voting at the last general election in the territory of the proposed new district. The residents of the Bloomfield district, without explanation, but probably because they aggregated less than thirty-five percent of the combined new district, failed to present such a referendum petition. Instead, they proceeded under section 3311.231, Revised Code, and countered with a petition proposing the transfer of the Bloomfield district to an adjoining city school district. This transfer petition required "fifty-five percent of the qualified electors voting at the last general election residing within that portion of a school district proposed to be transferred." Thus, while a larger percentage of electors was necessary, the relevant territory was considerably reduced. Furthermore, if that transfer petition could have been properly placed upon the ballot at the next general election, and if the consolidation of the county school districts could have been avoided in the meantime, only a majority of the electors residing in the Bloomfield district would have been necessary to authorize the transfer to the city.

The Court concluded that the resolution of the county board, adopted March 16, became effective thirty days later on April 15 since no petition of referendum against it had been filed. This ended the existence of the Bloomfield district on April 15. The petition to transfer which was initiated by the Bloomfield electors was not filed until April 11, and since the county superintendent had "thirty days following the filing of said petition"[287] to present that petition to the county board, the Bloomfield district was validly terminated before the transfer petition had to be considered.

The Court went on to say that the subsequent submission of the transfer petition to the electorate in the succeeding election was a nullity, and the request by the petitioners to have their opportunity to submit the transfer proposal was without merit because there would have been an opportunity to properly object with a referendum petition.

The Court here displayed its eagerness to terminate the proceedings in this case which had caused delay and confusion in the orderly administration of the public schools involved. However, in doing this it ignored the fact that even after the Bloomfield district was validly consolidated into the new county district a majority of the electors residing in the old Bloomfield district could propose by petition under section 3311.231, Revised Code, to transfer the old Bloomfield district from the new consolidated district. The only difference would be that the approval of this petition at an election would require a majority of the electors residing in

[287] OHIO REV. CODE ANN. § 3311.231 (Page Supp. 1967).

the entire new district of which the Bloomfield district was a part. This submission at an election never occurred, and the election that was held was limited to the electors of the old Bloomfield district. A proper disposition of the case would have been for the Court to remand with an opportunity for the appellants to request the submission of their original petition to all of the electors of the new district.

Local Option.—The status of township territory, subject to a valid local option election prohibiting the sale of intoxicating liquor, and subsequently annexed to a municipal corporation, was raised in *Canton v. Imperial Bowling Lanes*[288] by the city of Canton in an action for a declaratory judgment. Normally, all actions affecting the regulation of liquor originate in the Court of Common Pleas of Franklin County pursuant to section 4301.31, Revised Code. This case was filed in the Court of Common Pleas of Stark County, and the Court held that as a declaratory judgment action against a liquor permit holder the case did "not purport to be an action against either the board, the director, or the Department of Liquor Control."[289]

Section 709.10, Revised Code, states that territory annexed to a city "is deemed a part of the municipal corporation, and the inhabitants residing therein shall have all the rights and privileges of the inhabitants within the original limits of such municipal corporation." The defendant-appellant argued that one of the rights and privileges is the opportunity to utilize a permit to sell intoxicating liquor, but the Court noted that section 4301.32, Revised Code, allows either a municipal corporation or a part of a municipal corporation to hold a local option election. Therefore, the use of a liquor permit is not a right common to all inhabitants of a municipal corporation. Recognizing this, it then becomes immaterial that part of the former "dry" township territory had been transferred by annexation to a city. The conclusion reached was that, in effect, after a valid local option election has taken place the alteration of political or corporate boundaries does not affect the status previously conferred on the territory. The only way for the annexed portion to change its status is to participate in a new local option election based upon a district as defined in section 4301.32, Revised Code. It is interesting to note that, after the annexation of this territory to the city of Canton, even if the remaining township territory were to hold a new election and vote "wet," the annexed portion of the old township would remain dry because the territory covered by the new township election would be "exclusive of any municipal corporation or part thereof located in such township."[290]

Annexation Statutes.—Section 707.01 *et seq.*, Revised Code, and sec-

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[288] 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968).

[289] *Id.* at 49, 242 N.E.2d at 568.

[290] OHIO REV. CODE ANN. § 4301.32(C) (Page 1965).

tion 709-01 *et seq.*, Revised Code, relating to incorporation of and annexation to municipal corporations, respectively, were amended by the General Assembly, effective December 1, 1967.[291] These statutory revisions made several changes in the procedures for altering the status and boundaries of unincorporated territory. Since the acts did not expressly apply to proceedings pending on their effective date, such proceedings were still subject to the provisions of the statutes as they existed prior to December 1, 1967.[292]

In November, 1967 there were several petitions filed with the appropriate local boards in Hamilton County to either incorporate the unincorporated area known as Kenwood or to annex a part of that area to one of the adjacent incorporated municipalities. These petitions were pending before the board of county commissioners on December 1, 1967. On December 11, 1967, after the effective date of the amendments, an additional petition to annex a portion of Kenwood to another municipal corporation was filed.

What had apparently been the accepted standard, and which standard the county commissioners were intent on following, was that the various petitions would be heard in the order of their filing. As might be expected, procrastination in such hearings and decisions had become the rule. A conflict then arose due to the provision in the amended version of the annexation statutes requiring the commissioners to set a hearing on the annexation petition in not "less than sixty nor more than ninety days after the petition is filed," and further requiring that the board decide the petition "within ninety days after the hearing."[293] When that period had expired, the petitioners for annexation commenced an action for a writ of mandamus. That case reached the court this term as *State ex rel. Hannan v. DeCourcy*.[294]

The board of county commissioners relied upon *Hoye v. Schaeffer*[295] and the opinion therein of Judge Bell, where he accepted the theory that "proponents of annexation and those of incorporation are required to engage in races to the court house."[296] The court in *Hannan* repudiated this assumption: "The time of filing of various petitions was not determinative of any priority for their consideration. Their order of precedence was within the discretion of the board of county commissioners subject, of course, to applicable statutory limitations."[297] The Court seemed

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291 132 OHIO LAWS 353, 362.

292 OHIO REV. CODE ANN. § 1.20 (Page 1969).

293 OHIO REV. CODE ANN. § 709.031 (Page Supp. 1968); OHIO REV. CODE ANN. § 709.033 (Page Supp. 1968).

294 18 Ohio St. 2d 73, 247 N.E.2d 465 (1969).

295 166 Ohio St. 277, 141 N.E.2d 765 (1957).

296 *Id.* at 278, 141 N.E.2d at 766.

297 18 Ohio St. 2d at 82, 247 N.E.2d at 470.

to say that the board could, within its discretion, hear various petitions in whatever order it wished, without regard to the promptness of the petitioners. This was undoubtedly a frontal attack upon the general understanding which had prevailed since *Hoye*. While that may have been desirable, it was also probably unnecessary. The board had more than adequate time, within the 90-day period provided in which to hear the annexation petition in question, to also hear all of those pending petitions which had been filed before December 1. And it could have heard those petitions in the order in which they had been filed. The amended statutes gave the subsequent petitioners the right to a hearing and decision within a set time, and these amendments were well known to the prior petitioners. If they had wanted to protect their rights under the *Hoye* doctrine, they could have brought independent mandamus petitions to have required the board to act before the expiration of the subsequently enacted statutory period. Therefore, the enactment of the statutory amendments without provision for pending petitions would not necessarily have prejudiced their position under the then accepted theory of law.

L. *Local Government*

County Government Forms.—The county has traditionally been a unit of state government, a territorial and political subdivision.[298] As such, it has been distinguished from the semi-autonomy of a municipality which, since 1912, is assented to by the people as local self-government rather than superimposed as an administrative convenience by the state.[299] Ohio counties were uniformly of this mold until the constitutional amendment of Article X, adopted in November, 1933, provided for county home rule.[300] By adopting a county charter through a double election procedure[301] the county becomes a political entity distinct from a branch of state government, and it may legislate on local matters. In November, 1934, the voters in Cuyahoga County approved a county charter,[302] and a similar one was defeated in Hamilton County.[303]

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298 *See* Shoup, *Constitutional Problems of County Home Rule in Ohio*, 1 W. RES. L. REV. 111, 113 (1949).

299 Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109, 118 (1857).

300 OHIO CONST. Art. X, §§ 3-4.

301 Pursuant to section 4 the question is submitted to the electors whether a county charter commission should be chosen. If a majority respond favorably, the commission is elected and the charter it subsequently proposes is submitted to the electors, with various simple majorities required for approval depending upon the charter's effect.

302 However, the Board of Elections of Cuyahoga County refused to certify the results due to a dispute as to the effect on municipal powers and a consequent disagreement as to the types of simple majorities required, and the Court denied a writ of mandamus. State, ex rel. Howland, v. Krause, 130 Ohio St. 455, 200 N.E. 512 (1936).

303 Shoup, *supra* note 298, at 124. *See also* Walker, *County Home Rule in Ohio*, 1 OHIO ST. L.J. 11, 12 (1935); and Lowrie, *Interpretation of the County Home Rule Amendment by the Ohio Supreme Court*, 10 CIN. L. REV. 454 (1936).

A non-home-rule county is an agent "of the state, primarily concerned with the local administration of state policies."[304] The county is authorized to perform numerous local functions by general law.[305] The General Assembly is empowered to enact such laws by the Ohio Constitution in Article X, section 1. Before the adoption of this amended article in 1933, general law and the constitution provided only for the election of county officials; this became the standard form—locally elected county officers applying Ohio general law. The constitutional amendment, in addition to permitting county home rule, also included a provision allowing the General Assembly to establish "alternative forms of county government" in the section which continued its power to govern counties by general law in the absence of a home rule charter adopted by the electorate.[306]

Bills proposing alternative forms were introduced in the General Assembly in the sessions immediately following the adoption of the amendment, but they failed to pass.[307] In fact, no alternative form law was enacted until 1961.[308] The sponsors of that bill recognized the constitutional limitations on such a law and admitted that the General Assembly could not circumvent the elective procedures of sections 3 and 4 of Article X by constructing an alternative form under section 1 with municipal powers. Thus the 1961 law had "one basic objective: to provide means for meeting modern county governmental problems, within the existing governmental framework."[309] The technique was to permit a county executive for administrative management of the policies adopted by the elected county commissioners. This was undoubtedly a wise modernization for urban counties, and one which was constitutionally valid.

In 1967, with no counties having adopted the alternative executive form since 1961, the General Assembly amended the enabling legislation.[310] On September 6, 1967 the Board of County Commissioners of Hamilton County adopted a resolution determining to place on the ballot "the county appointive executive form." An action was filed to enjoin the submission of the question because of alleged constitutional infirmities in the statute. The election was held, but the ballots were impounded without a count to await the decision on appeal. The case of *Blacker v. Wiethe*[311] thus came to the Court.

The principal contention of plaintiffs-appellees in objecting to the

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304 Reilly & Leach, *The Ohio Alternative Form County Government Law*, 22 OHIO ST. L.J. 696 (1961).

305 OHIO REV. CODE ANN. § 3 (Page 1953).

306 OHIO CONST. Art. X, § 1.

307 S.B. 134, 91st Gen. Ass. (1935-36); H.B. 464, 92d Gen. Ass. (1937-38).

308 129 OHIO LAWS 1638; OHIO REV. CODE ANN. ch. 302 (Page 1953).

309 *See* Reilly, *supra*, note 304, at 698.

310 132 OHIO LAWS 235.

311 16 Ohio St. 2d 65, 242 N.E.2d 655 (1968).

statutory scheme was that section 302.13(M), Revised Code, a wholly new subsection added by the 1967 legislative amendments, constituted a standardless and unlimited delegation of legislative power in violation of the constitutional principle that "the legislative power of the state shall be vested in a General Assembly."[312] In effect, the opponents of the executive plan were saying that the General Assembly had misinterpreted its constitutional mandate to provide alternative *forms* and had wrongfully emphasized its power to provide for the *government* of counties. This raised a significant constitutional question.

The Court, in an opinion by Chief Justice Taft, dismissed the argument by first admitting that legislative power is granted to the Board of County Commissioners by section 302.13(M), Revised Code, and then concluding that this is limited to purely county matters.[313] Perhaps this would have been sufficient for the decision, and it could have been appended to this rationale by later decision that county legislation remains subject to general law. But that which follows in the opinion, and which may or may not be dicta as it reflects upon the legislative delegation issue, is more ultimate in its implication.

The opinion states that "[s]ection 1 of Article X gives the General Assembly the authority to provide not only 'forms of county government' but in doing so to provide for the 'government of counties.' One of the powers of government is the power to legislate."[314] This overlooks the fact that the phrase providing for the "government of counties" is in the clause which merely continues, from the pre-1933 constitution, the General Assembly's power to "provide by general law for the organization and government of counties." That power exists through the constitution without specific provisions for alternative forms in Chapter 302, Revised Code, and is the authority for all the traditional county statutes which existed before 1961 and remain throughout Title 3, Revised Code. It was never suggested that the General Assembly could delegate legislative powers to traditional counties, and the import of that clause in section 1 suggests that the General Assembly is the sole legislative authority for section 1 counties.[315] Constitutional history, in comparing the pre-1933 version of Article X with the current one, is persuasive that the "alternative forms" provision did not intend an alternative legislative body for a county to replace the General Assembly's duties, but meant an alternative to the strictly elective pattern.

Sections 3 and 4 of Article X establish the mechanism to achieve what the Court has condoned under section 1. The Court's opinion ex-

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312 OHIO CONST. Art. II, § 1.

313 16 Ohio St. 2d at 67-68, 242 N.E.2d at 656-657.

314 *Id.* at 68, 242 N.E.2d at 657.

315 "The General Assembly *shall* provide by general law . . . ." (emphasis added).

pressly views section 1 as a short-cut to the same end.[316] Its reason in support is that: "Probably, because of confidence in the General Assembly, the requirements for approval of such a charter are less stringent where it is, in effect, prepared by the General Assembly . . . than those requirements are where the charter is prepared locally by a charter commission . . . ." This is not substantiated by cited authority. Also, it is noteworthy that those writing in the 1930's, when the intentions of the initiators of the amendment were fresh in their minds, did not mention such a theory.[317] Furthermore, it is logically open to question: why should the General Assembly be presumed more capable of anticipating local self-government needs, and especially when the amendment had to be proposed by initiative petition due to the opposition of the rurally dominated legislature?[318]

The first paragraph of the syllabus of the Court leaves some room for re-consideration in another case. It only holds that the delegation of legislative power pursuant to section 1 "is not unconstitutional on its face." It must be remembered that the case arose as a challenge to the election, and therefore to the entire plan. As previously noted, and as conceded by appellees in their brief,[319] the basic alternative form idea is probably sound and permissible. When a challenge to the operation of a specific county-legislated act arises, perhaps the Court will strike down section 302.12(M), Revised Code. This was argued by appellants, urging that the provisions of the plan were severable and could be individually challenged after the adoption of the entire plan. The Court seemed to ignore the severability issue, but this is the best distinction of the case which is available for the second round of litigation.

Exemption of "Emergency" Ordinances from Constitutional Referendum Requirement.—Sections 3 and 7 of Article XVIII of the Ohio Constitution authorize a municipality to adopt a city charter and exercise home rule. A charter municipality may provide its own initiative and referendum provisions, but where the charter does not so provide, or if the municipality has no charter, the provisions of sections 731.29 and 731.30, Revised Code, apply.

Article II, section 1f of the Ohio Constitution guarantees the powers of initiative and referendum to the people of each municipality "on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in

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316 "Under Section 1 of that article, the General Assembly, in effect, prepares such a charter," as the one which "the people, through their elected representatives, prepare" under sections 3 and 4. 16 Ohio St. 2d at 69, 242 N.E.2d at 657.

317 *See* Walker, *supra*, note 303, and Lowrie, *supra*, note 303.

318 *See* Lowrie, *supra*, note 303, at 455.

319 "We suggest that Chapter 302, in its pre-1967 form, may have been a valid plan for such 'alternative forms.'"

the manner now or hereafter provided by law." Section 731.30, Revised Code, adopted pursuant to Article II, section 1f purports to establish "the manner" of exercising the referendum power. In so doing it appears, at first impression, to go substantially beyond the authorization of the constitution in providing that, among other ordinances, "measures necessary for the immediate preservation of the public peace, health, or safety in such municipal corporation, shall go into immediate effect." Thus, "emergency" measures adopted by a two-thirds vote of the municipal legislative authority are effectively exempted from the referendum power guaranteed to the people.

In *Shryock v. Zanesville*[320] the Court held that section 4227-3, General Code (now section 731.30, Revised Code), was constitutional. In reaching that conclusion the Court construed section 1f, in the light of sections 1a through 1d, noting that section 1d removed state emergency laws from the initiative and referendum provisions. However, section 1f appears on its face to be absolute and itself refers to no other sections.

State ex rel. Fostoria v. King[321] followed *Shryock* and also said that the courts will not scrutinize those measures passed pursuant to section 731.30, Revised Code, to determine whether or not there was a legitimate emergency involved. It noted that the statute, as well as most municipal charters, requires a vote of the legislative authority in excess of a simple majority to pass a measure as an emergency. This was said to be a sufficient protection to compensate for the people's loss of their constitutionally guaranteed referendum power. The opinion went on: "[i]f there was in fact no emergency or if the reasons given for such necessity are not valid reasons, the voters have an opportunity to take appropriate action in the subsequent election of their representatives."[322]

With this background the Court obviously considered the issue closed this term and decided *State ex rel. Brunthaver v. Bauman*[323] with a two sentence *per curiam* affirmance referring to its previous decisions. It is unfortunate that the issues could not have been presented as a case of first impression. The ordinance objected to by plaintiff-appellant appropriated $400,000 for the purpose of constructing a flood protection project along the Sandusky River at Fremont, Ohio. This amount was the first of what promised to be a long series of capital expenses, and the investment of this initial fund would represent sunk cost encouraging future legislators to continue the project in order to achieve some benefit. In these circumstances the *King* reasoning is strained. Those taxpayers objecting to the commencement of the expensive long-range project would

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320 92 Ohio St. 375, 110 N.E. 937 (1915).

321 154 Ohio St. 213, 94 N.E.2d 697 (1950).

322 *Id.* at 221, 94 N.E.2d at 701.

323 18 Ohio St. 2d 59, 247 N.E.2d 310 (1969).

not have an adequate remedy in removing the current city council at a future election.

Permissive County Sales Tax Referendum.—In enacting sections 5739.021 and 5741.021, Revised Code, the General Assembly delegated its authority to impose additional sales and use taxes, respectively, to the several boards of county commissioners. This discretionary one-half of one percent tax may be adopted for any county by resolution of that county's board. By virtue of sections 305.31 *et seq.*, Revised Code, such a resolution is subject to a referendum election where local electors present adequate petitions as provided for in section 305.32. The constitutional validity of the delegation of state taxing authority is itself suspicious,[324] but the contemptible aspect of the legislature's approach to increased revenues is the illusory quality of the referendum subjecting the new tax to the people's approval. It is clear that the draftsmen of the statutes intended to avoid responsibility for new taxes but also hoped to prevent effective taxpayer opposition. With the decision of *State ex rel. Corrigan v. Perk*[325] late in the 1969 term, it was obvious that they had been successful.

Following the adoption of the necessary resolutions by a politically divided Cuyahoga County Board of County Commissioners on March 10, 1969, petitions seeking a referendum on those questions were circulated. Approximately 47,000 valid signatures were required to place the questions on the ballot. Over 76,000 signatures were filed, but only 10,000 of those included the signer's ward or precinct as required by section 305.32. The board of elections split evenly on political lines in voting on whether to count the signatures, and the Secretary of State decided the tie in favor of counting. This decision was challenged by a petition for a writ of prohibition filed in the Court by the Prosecuting Attorney of Cuyahoga County, who was ironically the official legal counsel to the board he was opposing.

In this posture the issue before the Court was reduced to the interpretation of section 305.32 which requires, in part, that "each signer . . . must be an elector of the county . . . and shall place on such petition, after his name, . . . the ward and precinct, if any." A long line of prior cases virtually dictated the conclusion that when the legislature uses the term "shall" it intends a mandatory provision. It is difficult to fault the Court on this principle, although two members dissented in extended opinions. The dissenting opinion of Justice Duncan candidly admitted that "I am aware that certain decisions of this court disagree with the position I have taken. Ordinarily, I am a firm believer in the sanctity of legal decisions and *stare decisis*. . . . Here, we are not concerned with a rule of

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[324] A temporary restraining order was granted in July, 1969, by the Cuyahoga County Court of Common Pleas in a suit filed on this theory, but the plaintiff lost in a hearing on the merits.

[325] 19 Ohio St. 2d 1, 249 N.E.2d 525 (1969).

property under which rights have vested, or with a prescribed rule of conduct on which many have relied in shaping their actions."[326] This reasoning would be more persuasive were it not for the fact that the legislature adopted the permissive tax scheme in the light of the past decisions which Justices Duncan and O'Neill would have rejected. It is not the function of a court to write better laws, but rather to determine what the legislature intended and whether it had the power to take the actions it did. Where that power existed, a court has to accept foolishness where it finds it.

That is not to say that a court may not construe statutory language in its most reasonable sense. It should never be presumed that a ridiculous conclusion was intended if an alternative does not strain the words and context. Thus, in regard to that very section, the Court has held that the word "shall" requires that wards and precincts be placed on a petition in a registration county, but it is not essential that the signer himself write these.[327] When so liberally applied, the only basis for objection which remains is that the use of wards and precincts at all is superflous and such a burden that it is void. Justice O'Neill's dissenting opinion attempted to pursue that path in terms of the irrelevance of this information in the practical work of the Cuyahoga County Board of Elections. Even if his contentions were true, it is untenable to argue that the burden violates the Ohio Constitution since Article II, section 1g itself requires the ward and precinct on statewide referendum petitions for municipal residents. Any claim of a federal constitutional infirmity is doubtful at best since the legislature need not have subjected a tax issue to referendum at all.

M. State Regulation

Although all of the cases discussed hereunder do not involve regulation in the traditional sense of a delegation of quasi-legislative, judicial and administrative powers to an expert agency or board, they are grouped under this heading as examples of the application of state power. Each subject subcategory shows the state in its governmental role affecting substantive economic rights, relationships and activities. This economic power is distinguished from taxation (examined in the next section) and workman's compensation (examined in section D). The principal purpose of the former is to efficiently and equitably raise revenue, and in the latter situation the state has assumed the function of trustee for a defined class of insured employees in the state.

The conclusion which the regulatory cases suggest is that the Court entertains a significant presumption in favor of broad state power, particularly where inherent authority is involved as in the case of eminent domain.

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[326] *Id.* at 12, 249 N.E.2d at 531.

[327] State *ex rel.* Poor v. Addison, 132 Ohio St. 477, 9 N.E.2d 148 (1937); Lynn v. Supple, 166 Ohio St. 154, 140 N.E.2d 555 (1957).

The public utilities decisions of the term might raise doubt about the consistency of the predisposition for the state, but two factors are important in that area: The Court is construing a limited statutory grant of commission jurisdiction, and the particular commission involved has not been of uniformly high quality.

Appropriation.—Section 19 of Article I of the Ohio Constitution requires the state to compensate a property owner for the acquisition of his interest in private property or the imposition of an additional burden upon that property. Both a total and a partial taking may be considered appropriation.

The question raised in *Ziegler v. Ohio Water Service Co.*[328] was what constitutes an "added burden," when the state has previously acquired less than a fee. Ohio has consistently maintained a distinction between the public interest in municipal streets, which is considered a fee, and that in highways outside municipalities, which is an easement with the fee divided in the centerline between the abutting property owners.[329] The use of city streets by a municipality for many public services was thereby unrestricted, but the laying of pipes or wires in the right-of-way outside municipal limits necessitated further compensation to the abutting owners in those cases where the activity could not be classified as travel or assisting travel within the limits of the state's easement. The decision in *Ziegler*, under the guise of easing the state's urban expansion, explicitly overruled the traditional distinction and concluded that the interest in existing rural highways is equivalent to a fee: to hold otherwise "would be the rejection of evolutionary change." This holding ended the efforts at distinction in a previously discredited case to describe the construction of water mains or sewers as a variation on transporting water[330] or as not amounting to a burden.[331]

Where the fact of appropriation is admitted, the question becomes one of the method of taking and the owner's protection. The Uniform Eminent Domain Act and many local ordinances contain what is known as a "quick take" procedure which permits the appropriating authority to deposit its appraised value of property to be appropriated and then immediately commence entry and construction. This is naturally a great advantage for

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328 18 Ohio St. 2d 101, 247 N.E.2d 728 (1969).

329 Daily v. State, 51 Ohio St. 348, 37 N.E. 710 (1894); Hofius v. Carnegie-Illinois Steel Corp., 146 Ohio St. 574, 67 N.E.2d 429 (1946).

330 This was the Court's description of State *ex rel.* Graham v. Board of County Commrs., 123 Ohio St. 362, 175 N.E. 590 (1931).

331 This seems to be the actual basis for *Graham*, *id.*, but one which the Court understandably ignored since the constitution explicitly directs that benefits to the property owner(s) are to be ignored. Thus, under the traditional rule of highway ownership the *Hofius* case, *supra* note 328, was technically correct and the Court had to overrule it to forthrightly reach the *Graham* result.

public projects, involving no delay and no prior adjudication of either the ultimate liability to the property owner or the sufficiency of the deposit. Since 1851, the Constitution has restricted this practice in Ohio to the building of roads and in times of general emergency. In an extremely important *per curiam* opinion this term in *Worthington v. Carskadon*[332] the Court stated a narrow definition of public roads and outlined the owner's proper remedies.

The project in the *Worthington* case involved a drainage pipe constructed under a highway and into an open ditch dug on the appellant's property. The city initiated its quick take procedure by filing a petition and making a deposit. The owner responded with an answer to the petition. On appeal the owner challenged the legality of the take and prayed that the city be required to fill the ditch and return the property to its original condition. Such a request was manifestly unreasonable in view of the city's right to pursue the project through the normal route of jury trial prior to construction, and the appellant had been compensated by a jury subsequent to completion.

But the Court went out of its way to quote the concurring Court of Appeals opinion to the effect that at least the portion of the ditch on appellant's property was not within the Constitution's concept of a public road, and that it could have been blocked by an injunction against the city *and* by criminal trespass and civil damages against the contractor entering pursuant to the city's invalid authority. This was an unusual half-victory for an appellant in a case fought primarily on principle.

Where there is both an admitted appropriation and a reliance by the authorities upon the normal route of petition and adjudication, prior to commencement of the project, the question is one of the necessary response of the property owner in order to protect his right to a jury's assessment. This problem was considered in two cases during the 1969 term.

After the filing and service of an appropriation petition, the defendant-owner has until the third Saturday to file his answer.[333] The owner need not answer at all, but under section 163.09, Revised Code, he is obligated to accept judgment and waive his right to jury trial if a value for the property has been "set forth in any document properly filed with the clerk of courts, by the public agency." That provision was held in *Board of Education v. Dudra*[334] to apply only where the document has been "filed within a reasonable time prior to the expiration of the time for filing an answer." This rule is to further the purpose of allowing the defendant-owner to examine the value which would be awarded automatically if he chose to waive a jury. On the other hand, when no value has been filed,

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332 18 Ohio St. 2d 222, 249 N.E.2d 38 (1969).

333 OHIO REV. CODE ANN. § 163.08 (Page 1969).

334 19 Ohio St. 2d 116, 249 N.E.2d 832 (1969).

Dudra held the failure to answer irrelevant, and the constitutional jury right remained. *Cincinnati v. Bossert Machine Co.*[335] interpreted "document" to include the petition and thereby allowed the court to enter judgment on the alleged value with no evidence of appraisal.

There was a division of the Court in *Bossert* as to the prohibition of any extension of answer time in section 163.08, Revised Code.[336] Four members considered that stipulation to be jurisdictional. If that position had been blindly followed, it would have led to the conclusion that the failure to answer in *Dudra* should have been fatal to the jury right.

An appropriation case presented to a jury is uncommonly simple so far as the definition of the issue, namely valuation. But the courts have been repeatedly faced with disputes over the proper measure of valuation. Ohio has adopted the highest-and-best-use standard for the computation of compensation, and this term in *Masheter v. Board of Education*[337] the Court reaffirmed that principle by applying it to property with no recognizable market value for its current use.

In *Masheter*, the state appropriated a vintage 1880 public school for highway construction, and the trial court charged the jury that in the case of public facilities the rule of fair market value would not apply and instead the jury should compute the cost of a substitute equivalent facility. That effort by the court is not without merit since it reasoned that (1) a school building is normally the highest and best use of the particular property, (2) there is no ascertainable market for a school, and (3) the only reasonable measure of market value in such case is that which planners would have to consider as the cost of constructing a building which would provide duplicate services. This approach, however, does not adjust the cost to the state for the factor of depreciation or recognize that the school board is acquiring a building with a longer useful life than the one it previously had. That is a necessary fault because the provision of a substitute, which the school authorities may not have independently constructed for many years, requires new construction since a similarly depreciated equivalent facility is seldom available.

The Court applied the market value test as a method of correcting the depreciation problem. It concluded that where there is no active market an assumed market value may be constructed from replacement cost less depreciation. But the Court also emphasized a more important valuation principle, that is the best-use standard. Thus, in situations such as the one before it, the property as a whole, and not just the building, should always have some ascertainable market value. In some cases that value could benefit public bodies since a facility maintained on appreciated land would not

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335 16 Ohio St. 2d 76, 243 N.E.2d 105 (1968).

336 *Id.* at 78, 243 N.E.2d at 107. *See also* dissent of Herbert, J., at 79.

337 17 Ohio St. 2d 27, 244 N.E.2d 745 (1969).

be adequately compensated by the construction of an equivalent on a site of considerably less value.

Private Use of Land.—Regulation and restriction of a private owner's use of his land was before the Court in two forms during the 1969 term. First, there was the question of the limits of state power to restrict for public benefit in *State v. Buckley.*[338] And second, there was the problem of the administration of land regulations in *State ex rel. Broadway Petroleum Corp. v. Elyria.*[339]

In his last opinion before resigning from the Court to become Attorney General, Justice Brown upheld the constitutionality of Ohio's junkyard statutes in *Buckley.* Following the opinion's definition of the issue, the Court held that regulation of a junkyard, with the state's police power to protect the public health, safety and morals, could constitutionally be founded upon purely or primarily aesthetic considerations.

The opinion equivocates in its support of the syllabus, and the impression created is that "aesthetic" is used in an extreme sense. The view of unfenced junkyards is described as "generally patent and gross, and not merely a matter of taste."[340] As a conclusion of law that description might be considered overly arbitrary, but its greater vulnerability is that it is followed by the statement that "it cannot be effectively argued in this case that the statutes would be unconstitutional as applied, . . . [but] we do not hold that these counterarguments could not be persuasive on another set of facts."[341] It is difficult to coordinate that theory of selective constitutionality with the other conclusion in the case that the laws are valid because they "are neither vague nor uncertain." A statute as explicit as that involved in *Buckley*, with no internal provisions for varying applications in specific situations with different degrees of aesthetic offensiveness, is either valid or not, and a court should exercise its imagination as to the range of fact patterns to which it might apply.

It is well understood that as to almost every phase of government regulation of land the private owner has the protection of judicial review. But this term in *Broadway Petroleum*[342] the Court recognized that judicial intervention may become a burden on the landowner, and his right to rely upon favorable administrative determinations was protected from internal bureaucratic disputes.

By holding that a building inspector, who refused to issue a permit because of a zoning restriction, could not seek judicial review of the reversal of his decision by a board of zoning appeals, the Court implied that the administrative process should be weighted slightly in favor of the pri-

338 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968).

339 18 Ohio St. 2d 23, 247 N.E.2d 471 (1969).

340 16 Ohio St. 2d at 132, 243 N.E.2d at 70.

341 *Id.*

342 18 Ohio St. 2d 23, 247 N.E.2d 471 (1969).

vate party. Its rationale seemed to be two-fold: first, the complaining official was an administrative inferior to the board, and second, one of the board's purposes is to provide an administrative remedy for an incorrect, arbitrary or inequitable decision. The first of these propositions is the more significant, for it establishes a theory of judicial restraint in the interference with agency and departmental decision-making. It also states a recognition of final authority. The result suggested is that subordinates must learn to respect the finality of authorized superiors, and while the wisdom of decisions may be internally questioned, third parties need not have their rights compromised or left open to attack. As such the opinion by Chief Justice Taft goes beyond the premise of Professor Jaffe which he cites.[343] Jaffe's admission that revisory power within a department should be ultimate is extended in *Broadway Petroleum* to a functional basis: any administrative (i.e. non-judicial) level with power to review and revise lower determinations is by reason of its position the final decision-maker for purposes of third parties. This seems important to maintain the integrity of the structure, a result more valuable to a reviewing court than the consequences in the particular case.

Public Utilities.—It has become commonplace for the Court to chastise the Public Utilities Commission for construing its authority too liberally,[344] but this term the Court also reviewed a case where it affirmed the commission's decision that it lacked jurisdiction. In an unusual procedural development the Northern Ohio Telephone Company, a regulated utility, filed an application under section 4905.40, Revised Code, for permission to issue securities which would technically facilitate a merger of that company into General Telephone & Electronics Corporation, a holding company not subject to commission regulation. That application was immediately and summarily approved, without hearing. Then, almost two months later, International Telephone & Telegraph Corporation filed a request that the commission vacate its earlier order and reconsider its approval. This the commission did, relying upon its inherent authority to review. At a prehearing conference, Northern Ohio reversed its allegation on the original application and contended that the transaction was not within commission jurisdiction. Once again the commission adopted Northern Ohio's contentions without a full hearing, and an order was issued to that effect. In *International T. & T. Corp. v. Pub. Util. Comm'n,*[345] the Court affirmed that second conclusion.

The principal difficulty with the *I. T. & T.* decision is that it is appar-

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343 Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 538 (1959); 18 Ohio St. 2d at 31-32, 247 N.E.2d at 477.

344*See* B. & O. Rd. Co. v. Pub. Util. Comm'n, 16 Ohio St. 2d 60, 242 N.E.2d 577 (1968); Ohio Bell Telephone Co. v. Pub. Util. Comm'n, 17 Ohio St. 2d 45, 245 N.E.2d 351 (1969), discussed *infra.*

345 18 Ohio St. 2d 83, 247 N.E.2d 726 (1969).

ently the first occasion on which a reverse merger has been considered in an Ohio public utility context. It is manifest that the commission gave the implications of this method of acquisition only cursory attention, and the holding of the Court appears to accept the theory of regulatory immunity without reaching the merits and details of the transaction. The unusual route to the Court suggests two thoughts in that regard. First, without elaboration of the contentions and findings below, the record was inadequate and confusing to a Court which seldom considers complicated corporate financial problems. As a consequence, this was not a desirable case in which to make any precedential statements. Second, there was an opportunity for the Court to affirm on a procedural theory. A utility is not required to file an application for an action which is not subject to regulation, and presumably an unnecessary application may be withdrawn. However, if a utility's interpretation of the extent of jurisdiction is incorrect, either the P.U.C.O. or the Attorney General may proceed against it.[346] A third party may urge those objections or institute a private action.[347] *I. T. & T.* may have been correct on its law but mistaken in its remedy.

The dangerous implication of the language in the case, however, is that neither the commission nor the courts will be justified in reviewing similar mergers in the future. That abdiction will streamline and encourage the trend toward utility consolidation into holding company structures whose overall business decisions are exempt from state scrutiny. Possibly that is justified from a management efficiency viewpoint, but it does not appear to be consistent with the language of the statute which purports to cover all securities issues. The most favorable rationale for that result would be a theory that state regulation is only intended for companies whose financial structure remains within the commission's concern after the completion of the transaction, but that interpretation of the statutory scheme has never in fact been made.

In two other cases, *Baltimore and Ohio R. Co. v. Pub. Util. Comm'n*[348] and *Ohio Bell Telephone Co. v. Pub. Util. Comm'n*,[349] the Court demonstrated its traditional chastisement of the commission. In each case the holding was that the commission had overreached its authority. The former decision determined that the commission may not rely upon its general power to protect the public welfare to extend its explicit authority for particular utility actions. In other words, the specific is a limitation upon the general rather than vice versa. In a similar commission order in *Ohio Bell*, both cases having been attempts by the P.U.C.O. to hold proposed utility

346 OHIO REV. CODE ANN. § 4905.60 (Page 1953).

347 OHIO REV. CODE ANN. § 4905.61 (Page 1953); Sylvania Home Telephone Co. v. Pub. Util. Comm'n, 97 Ohio St. 202, 119 N.E. 205 (1918).

348 16 Ohio St. 2d 60, 242 N.E.2d 577 (1968).

349 17 Ohio St. 2d 45, 245 N.E.2d 351 (1969).

actions in abeyance pending review, the Court also said that this was unjustified from the applicable legislation. The *Ohio Bell case* was easier than the *B & O* case on the facts, however, since the railroad was decreasing service while the telephone company was proposing to establish a new service with a related rate schedule. In such a case it is almost beyond dispute that, even if the rates requested were too high, there would be no reason to withhold the service from those members of the public who would be willing to purchase the equipment in the interim before approval.

While the *B. & O.* and *Ohio Bell cases* showed a Court with a skeptical view of commission eagerness, that attitude is easier to understand in the light of an appeal which was argued to the Court during the first week of the term and pending decision during the ensuing eight months in which the above cases were heard and decided. A comparison of the *per curiam* opinion and the concurring opinion of Chief Justice Taft in *Erie-Lackawanna R. Co. v. Pub. Util. Comm'n*[350] reveals a disagreement within the Court only as to the form of criticism of the commission. The *Erie case* was one in which the P.U.C.O. clearly had jurisdiction, but the commission's inadequate handling of the routine proceedings suggests a natural hesitancy to extend its authority to any area in which an ambiguity exists. Taft's opinion reviewed the case history construing the statutory section which outlines the procedure which the commission is to follow in contested cases and charitably concludes that the commission may have "misinterpreted" some of those cases as an easing of technical standards. As a minimum, the findings of fact upon which legal conclusions are based must be stated for purposes of review as to reasonableness. The only findings of the commission were the ultimate conclusions which in and of themselves are worthless without a review of the entire record, a task undertaken in the *per curiam* opinion and one clearly uncalled for in the utility appeal situation where the scope of review is limited. A proper basis upon which the commission should, and hopefully will come to operate is (a) the initial adoption of objective standards for determining the necessity for a railroad grade crossing (or any other statutorily vague requirement)[351] and (b) the recital of facts found in support of or against the application of that standard. This dual commission determination would then provide a comprehensive basis for judicial review of the reasonableness of the standard and the adequacy of the facts to support the decision reached.

Industrial Commission Safety Requirements.—In order to improve working conditions in Ohio and make the state more competitive in

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350 18 Ohio St. 2d 112, 247 N.E.2d 736 (1969).

351 Substantially this argument was presented by appellant and noted by the Court at p. 113. However, it was ignored in the opinion and will likely be side-stepped by the commission until squarely confronted in a later case. Such a case would appear to be inevitable since the lack of a delineated standard for decision makes the entire statutory provision vulnerable to attack.

the attraction of labor, the General Assembly adopted chapter 4121, Revised Code, authorizing the Industrial Commission to promulgate specific safety requirements for Ohio workplaces, whether or not there was an Ohio employer in terms of state of incorporation, principal place of business, or place of execution of the employment contract. This term for the first time, and in spite of active objection by the commission which adopted and administers the rules, the Court in *State ex rel. Bailey v. Krise*[352] applied the regulations extraterritorially to a workplace in Iowa where a resident of Pennsylvania was injured while in the employ of a corporation organized under the laws of Ohio.

The injured employee had previously been compensated from the Ohio state fund pursuant to chapter 4123, Revised Code, in a proceeding which was not appealed. That award itself was questionable. Had he entered into the contractual agreement provided for in section 4123.54, Revised Code, binding both the employer and employee to recognize Ohio law as applicable to the employment relationship, no question as to his right to participate in the fund would have arisen.[353] Such an award is predicated solely upon an injury to an employee in the course of his employment for an employer amenable to chapter 4123, Revised Code, without regard to the employer's fault.

Chief Justice Taft's dissenting opinion noted the obvious distinction between the two statutory chapters, with no mention of enforcement of safety rules outside Ohio.

It is also clear, as emphasized by the posture of the commission in this case, that, even if the enabling legislation could be otherwise construed, the commission never has exercised the rule-making power to include extraterritorial places of employment. A delegation of quasi-legislative power is simply that, and it remains unused until orders are promulgated thereunder. The provisions for safety requirements in the Industrial Commission Act "are not self-executing and must be supplemented by special orders of the Industrial [Commission]."[354] The commission expressly refuted the implication that it had ever done this, and it is unjustifiable to assume that the same requirements would be adopted if they were intended for nationwide or worldwide application. Working conditions and standards necessarily vary with local peculiarities and economic realties.

There are sound reasons why the safety requirements do not automatically apply wherever workmen's compensation is appropriate. An employee such as Bailey is not deserving of more compensation than any other injured employee. All are compensated according to the nature and extent of their injury under chapter 4123. As Chief Justice Taft pointed out, the

352 18 Ohio St. 2d 191, 249 N.E.2d 55 (1969).

353 Prendergast v. Industrial Commission, 136 Ohio St. 535, 27 N.E.2d 235 (1940); Alaska Packers Co. v. Industrial Commission of California, 294 U.S. 532 (1935).

354 Zajkowski v. American Steel & Wire, 258 F. 9, 15 (6th Cir. 1918).

"additional award" under chapter 4121 is a penalty upon the employer, and it is paid to the employee to aid in enforcement rather than to compensate further.

Despite the contentions of Justice Schneider's majority opinion, the history of Section 35, Article II of the Constitution of Ohio is completely consistent with this explanation. It is true that, as the majority opinion notes, before the amendment in 1923 an Ohio employee was limited to the workmen's compensation fund, to which his employer had made a compulsory contribution, for an injury sustained as a consequence of "mere negligence."[355] However, for an injury caused by "the failure of the employer or [his] agent to comply with legal requirements, as to safety of employees, then the injured employee or his legal representative ha[d] his option to claim under the [workmen's compensation] act or sue in court for damages."[356] A landmark decision of the Court held that safety rules of the Industrial Commission were such "legal requirements," but the Industrial Commission Act itself did not establish any such requirements until the commission had created them.[357]

The termination of this employee option in 1923 did not substitute the additional safety requirement award for the civil action. Rather, it simply insisted that all employees rely upon the normal workmen's compensation award and proceed through the commission instead of the courts. Section 1465.61, General Code, which was in the original Workmen's Compensation Act, provided an optional civil action for violations of "any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employees, . . ."[358] and its amended version continued the option for the failure "to comply with any lawful requirement for the protection of the lives and safety of employees."[359] This amended language was merely a condensation of "the elements of lawful requirements which were enumerated in the original act."[360] These statutes recognized that the employee had a common law civil action based upon the employer's violation of legislative requirements other than those promulgated by the Industrial Commission with its delegated authority. The 1923 constitutional amendment abolished the right to this action as well as the one grounded upon commission safety requirements but provided an additional award only in the safety requirement cases. The reason for this is obvious: municipalities and other legislative bodies could provide their own enforcement techniques now that the civil action was

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355 State *ex rel.* Yaple v. Creamer, 85 Ohio St. 349, 97 N.E. 602 (1912).

356 *Id.* at 393, 97 N.E. at 607.

357 American Woodenware Mfg. Co. v. Schorling, 96 Ohio St. 305, 117 N.E. 366 (1917).

358 102 OHIO LAWS 524, 529.

359 OHIO GEN. CODE § 1465-76 (Page 1945); 103 OHIO LAWS 72, 84.

360 96 Ohio St. at 314-15, 117 N.E. at 369.

prohibited, but the Industrial Commission would still require an incentive for employees to bring violations to its attention.

In the light of this historical review, it is apparent that the termination of an employee's right to seek damages was not a manifest injustice requiring an award in addition to compensation. It was a policy decision that all compensation should be determined by one tribunal to promote uniformity of awards, to improve the expertise of the administrative agency, and to permit employers to enjoy some advantages of a compulsory insurance plan in the form of a predictable and consistent level of cost. Therefore, to deny any employee who is subject to workmen's compensation an opportunity to obtain an additional award for a safety requirement violation is not to deprive him of a right for which his common law action was exchanged.

There is a more significant reason, though, why such a recovery should have been denied the relator in *Bailey*. No cases exist which allowed recovery in a civil action before 1923 because of a violation of an Ohio ordinance, order, statute, or "lawful requirement" at a place of employment outside Ohio. The Ohio workmen's compensation statute was directly derived from Wisconsin law.[361] The Supreme Court of Wisconsin, in reviewing the parent of the Ohio statute, held that the compensation provisions were applicable whether an injury occurred within or without the state, but "The Legislature had no power to require safeguards, legally to authorize the employment of minors, or to regulate or supervise places of employment or public buildings without the state. The fact that the laws relating to the employment of minors, the safeguarding of machinery, and the supervision of places of employment and public buildings are to be considered in determining the liability of employers does not limit the application of the act, but relates solely to particular classes of injuries, and confers special powers upon the Industrial Commission."[362] No action premised on an extraterritorial violation of a state regulation could have been maintained in Ohio or elsewhere with a similar statute before 1963, and in surrendering the right to a civil action the plaintiff-workman in those circumstances lost nothing.

Sound policies prevented a civil suit in a case such as *Bailey* before 1923, and those same policies should have governed *Bailey*. The majority opinion acquiesces in Iowa's superior sovereignty on its territory: "Assuredly, Ohio will not sanction performance contrary to the law of the place of performance. . . ." But it concludes from the absence of conflicting Iowa citations in the record that the Ohio regulations will not violate Iowa law. The imposition of Ohio administrative provisions upon work-

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361 *See* dissenting opinion of Wanamaker, J., in American Woodenware Mfg. Co. v. Schorling, 96 Ohio St. at 341-43, 117 N.E. at 376, for a comparison of quotations.

362 Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 112-3, 170 N.W. 277 (1919).

places located in another state should not depend upon the whims of counsel. The courts of Ohio should be indifferent as to whether Iowa's law is in accordance or conflict, by inconsistent provisions or lack of them entirely.

There is absolutely no mention that the contract of employment was entered into in Ohio, or that there ever was a contract at all. There is no mention that Bailey individually, or as a member of a group or class of employees, ever entered into an agreement to be bound by the workman's compensation law of Ohio upon Form C-110 which must be filed with the Bureau of Workmen's Compensation to be valid. The existence of such a signed agreement would not have foreclosed the decision because of the distinction between workmen's compensation and safety requirement awards, but its absence considerably muffles the argument that Bailey was relying upon Ohio law. Thus, the question before the Court was whether any employee of a corporation organized under the laws of Ohio is eligible for an award for an injury resulting from the corporation's violation of an Ohio workplace regulation, regardless of the place where the employee was hired, the place where the work was performed, or the residence of the employee. Bailey was before the court in the same posture as if he had been a Iowa resident who had contracted in Iowa for an Iowa job with an Ohio corporation.

The practicalities of compensation insurance and regulation penalties are distinct. Unless Form C-112 (agreeing to be bound by another state's law) has been filed, an employer should reasonably presume that he may make contributions to the fund of his home state. It is important for the equitable administration of a state compulsory insurance fund that an employer can contribute in confidence to a single state for each employee. However, the more reasonable approach for the supervision of safety practices in each of an employer's business and work locations is for the employer to look to the law of the particular state in which the operation occurs. Unquestionably, that state has the authority to regulate the work locations within its borders. Under the rule which the court adopted, an employer must choose from among the regulations of all the states in which it does business that particular variation of each safety precaution which might later be determined by a court of an unknown jurisdiction to provide the greater protection to employees. Furthermore, this holding leaves employees uncertain as to which state's regulations they may insist upon when they are employed by a foreign corporation.

N. *Taxation*

The Court's review upon appeal from the Board of Tax Appeals is generally limited to determining whether the decision of the board was unreasonable or unlawful and does not involve a *de novo* weighing of the

evidence. This principle is often stated by the Court in its opinions, yet they commonly go into more detail than a strict adherence to that doctrine would require. This might raise some question as to the actual extent of the Court's review if it were not for the fact that the decisions usually favor the board. This term in published opinions the Court affirmed on six occasions, reversed on two, and allowed one writ of mandamus to issue directing the Board of Tax Appeals to proceed in requiring uniformity of county assessments.

Charities, Real Property and Unemployment Tax.—Bowers v. Akron City Hospital[363] involved a real estate tax exemption for property owned and used by an admittedly charitable institution for a vehicle parking facility. *Carmelite Sisters, St. Rita's Home v. Board of Review*[364] involved an exemption from contributions to the Unemployment Compensation Fund for a home which cares for the aged and infirm and is operated by a corporation not for profit. The former case was an appeal from the decision of the Board of Tax Appeals granting an exemption, and the latter case was an appeal from the Court of Appeals which had affirmed the lower court and administrative determination that the home in question was an employer and not exempt by statute. The Court affirmed the Board of Tax Appeals and reversed the Court of Appeals in the respective cases, recognizing charitable exemptions in each case.

Section 5709.12, Revised Code, allows an exemption of real *property* "belonging to institutions that is used *exclusively for charitable purposes.*" Section 4141.01(B)(2)(h), Revised Code, exempts from the definition of "employment," for purposes of the required employer contribution to the Unemployment Compensation Fund, "service performed in the employ of a corporation . . . [not for profit] and the *activities* of which are confined *exclusively* to the rendition of service . . . *for* . . . *charitable* . . . *purposes.*" (Emphasis added.)

A common factor to each of these cases was that the activity for which an exemption was requested required payment to the institution. In *Bowers* the parking lot actually showed a net bookkeeping profit, while in *Carmelite Sisters* the home operated on a break-even budget. In both instances any surplus revenue which was available was used to improve the facilities.

The Court stated in *Bowers* that "it is the use of the property rather than the fact that revenues are collected and received from property which is controlling."[365] The real property owned by the home in *Carmelite Sisters* had been determined by the Board of Tax Appeals to be used

363 16 Ohio St. 2d 94, 243 N.E.2d 95 (1968).

364 18 Ohio St. 2d 41, 247 N.E.2d 477 (1969).

365 16 Ohio St. 2d at 96, 243 N.E.2d at 97. However, the Board of Tax Appeals has continued to ignore that holding. *See, In re* Baptist Foundation Inc., No. 71522 (April 28, 1969) (unreported).

exclusively for charitable purposes and was therefore exempt from other taxation. The standards used in the real property and unemployment statutes are virtually identical, and it would have been most awkward for the home to be exempt for real property taxation and not exempt for purposes of the unemployment tax. The opinion of Justice Duncan hints at this consideration: "There may be good reasons why charitable institutions which are exempt from real property and inheritance taxation should not be exempt from contributing to the Unemployment Compensation Fund, but such reasons are not readily apparent from the statutes creating the various charitable exemptions which are similarly worded." But the Court does not rely upon the expertise of one administrative board in applying its statute as being more influential than that of the other board. Instead, the Court expressly analogizes a rest home to a hospital and concludes that the fulfillment of a need for care is a charitable purpose. In doing this it was necessary to distinguish or otherwise dispose of two previous decisions in which exemptions for homes had been denied. The Court took the courageous route and specifically overruled its decisions in *Crestview, Inc. v. Donahue*[366] and *In re Exemption of Real Property from Taxation by Lutheran Senior City.*[367]

Use Tax.—Miller Brewing Co. v. Schneider[368] was a decision of the Board of Tax Appeals formulating the principle that materials shipped into Ohio by a supplier, which relinquishes ownership, possession and control of the materials outside Ohio by consigning them to a common carrier, are not subject to the Ohio Use Tax.[369] *Hoffmann-LaRoche, Inc. v. Porterfield*[370] raised the narrow question of whether depositing items in the United States mail outside of Ohio for delivery without charge to residents of Ohio is within the *Miller* doctrine, accepted by the Tax Commissioner. The Court in its *per curiam* opinion did not review Supreme Court decisions on the constitutional limits of state use tax applications to interstate commerce and did not establish its own theory of relinquishment of control. Rather, the opinion engaged in dubious comparisons of the similarities in delivery by common carrier and by mail. The Court noted that "there is authority in other jurisdictions that delivery of a gift is completed at the time the item is deposited in the mail . . . ."[371] It did not refer to the traditional "mail box" rule of contracts which emphasizes deposit in the mails over receipt. Perhaps this was because the Court attempted to distinguish postal regulations allowing a mailer to recover mail at any

366 14 Ohio St. 2d 121, 236 N.E.2d 668 (1968).
367 9 Ohio St. 2d 151, 224 N.E.2d 352 (1967).
368 3 Ohio Tax Cases, ¶ 200-521 (1964).
369 OHIO REV. CODE ANN. §§ 5741.01-.22 (Page 1953).
370 16 Ohio St. 2d 158, 243 N.E.2d 72 (1968).
371 *Id.* at 161, 243 N.E.2d at 74.

time prior to delivery,[372] while some textual commentators have playfully used this development to question the current correctness of the historical "mail box" approach, viewing the postal service as the sender's agent.

Franchise Tax, Cooperative Apartment Corporation.—In *Woodland Gardens Apartments v. Porterfield*[373] the Court considered the basis for assessment of the Ohio franchise tax owed by a corporation, the sole function of which was to own and operate a cooperative apartment building occupied by the shareholders of the corporation.

The Court formally held that the franchise tax applies to any corporation organized for profit and authorized by its articles of incorporation to operate for profit. In reaching this conclusion there is the suggestion that the Court was impressed by the fact of a bookkeeping surplus existing at the end of each fiscal year. Although it was pointed out by appellants, the Court does not mention that this surplus was entirely due to the arrangement for quarterly assessments upon the shareholder-residents for purposes of maintenance of the building.

In considering the proper utilization of the franchise tax formula stated in section 5733.05, Revised Code, the Court insists that the only permissible figure for value of the issued and outstanding shares of the corporation is book value. Also, in calculating the formula provided by statute, the phrases "business done by the corporation in this state" and "value of its business . . . wherever transacted" do not refer to the activity of business as it is normally thought of in terms of commerce. These phrases are only used as a technique for allocating that part of a taxable corporation's book value appropriately subject to the Ohio franchise tax. Thus, although the corporation in question would probably not be considered by a layman to be engaged in business, the entire corporate enterprise is doing "business" in Ohio.

This case represents a harsh attitude on the part of the Court towards corporate cooperative ventures, but the decision will probably not affect the structure of such corporations to a great extent. Their accounting records, with the maximum value of land and buildings capitalized, are primarily constructed to allow large federal tax depreciation deductions. The savings thus realized would normally more than compensate for the increased Ohio franchise tax cost.

City Income Tax, Effect on Distribution of Local Government Fund.—The Board of Tax Appeals, in reviewing the allocation of a local government fund by a county budget commission pursuant to section 5705.37, Revised Code, must "determine the amount needed by each subdivision [of a county] for current operating expenses . . . in addition to revenues available from all other sources, except those revenues which a subdivi-

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372 39 C.F.R. §§ 153.5(a)-(c).

373 16 Ohio St. 2d 56, 242 N.E.2d 580 (1968).

sion receives from an additional tax or service charge voted by its electorate, in order to enable it to carry on its essential local governmental functions."[374]

The city council, as the legislative authority for the city of Painesville, enacted a city income tax. This tax was never submitted to the electorate. In its application of section 5739.23, Revised Code, the board included the revenues of the Painesville income tax in its tabulation of those "available from all other sources" and reduced the fund share for that city.

The interesting issue raised in *City of Painesville v. Bd. of County Commrs.*[375] was whether taxes voted by an elected city council are indirectly "voted by [the] electorate." The unanimous Court, in an opinion by Chief Justice Taft, explicitly rejected this contention. The effect of this holding is that a municipality in seeking to obtain the maximum benefits from a local income tax, despite the provisions of its charter, must subject the proposal to a popular vote.[376]

Real Property, Uniformity of Assessment.—Section 2 of Article XII of the Ohio Constitution requires that "land and improvements thereon shall be taxed by uniform rule according to value." In compliance with that section in 1965 the General Assembly enacted section 5715.01, Revised Code, which obligates the Board of Tax Appeals to "adopt, prescribe, and promulgate rules for the assessment of real property by uniform rule according to value . . . . The taxable value shall not exceed fifty percent of true value in money." Section 5715.24, Revised Code, directs the board to

> determine whether the real property and the various classes thereof in the several counties, municipal corporations, and taxing districts have been assessed by an equal and uniform rule at taxable value, and if the board finds that the real property or any class thereof . . . is not listed by uniform rule at taxable value, the board shall increase or decrease the aggregate value of the real property or any class thereof . . . by a percent or amount which will cause such property to be assessed on the tax list at its taxable value so that every class of real property shall be listed and valued for taxation by an equal and uniform rule . . . .

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374 OHIO REV. CODE ANN. § 5739.23 (Page 1953).

375 17 Ohio St. 2d 35, 244 N.E.2d 892 (1969).

376 When the electorate do approve a tax the Court scrupulously insists that they receive full benefit. "There is no reason for any county electorate to vote additional taxes upon itself to cover certain needs if this additional taxation is to result in a reduction of the county's allocation from the local government fund." Bd. of County Commrs. v. Budget Comm., 17 Ohio St. 2d 39, 41, 244, N.E.2d 888, 890 (1969). An interesting question is whether a tax issue, passed by a local legislative authority, is subsequently "voted by . . . [the] electorate" if a majority fails to nullify it in a referendum election. Although most taxes are not subject to referendum, this could arise under section 305.31, Revised Code, with the permissive one-half of one percent sales tax involved in State, *ex rel.* Corrigan, v. Perk, 19 Ohio St. 2d 1, ___ N.E.2d ___ (1969), this term. However, that particular tax is county-wide and therefore the distribution of the county local government fund would not be altered.

In *State ex rel. Park Investment Co. v. Board of Tax Appeals*,[377] decided in 1964, the Court granted a writ of mandamus ordering the Board of Tax Appeals to observe its statutory and constitutional duties. The Court construed those authorities as prohibiting the separation of real property according to use with different percentages of tax valuation. The Court also held that the relevant value of real property is "the amount for which that property would sell on the open market." Although the writ of the Court only directed the Board of Tax Appeals to determine whether the tax assessments in Cuyahoga County were made by uniform rule and, if not, to order the county auditor to equalize such assessments, it was clear that the Court interpreted uniformity as a common statewide rate of assessment.[378]

This term the Court was expressly faced with the question of variations in the level of assessment between counties. The same lawyer, representing one client in Hamilton County and another in Cuyahoga County, presumably in order not totally to mistake his remedy, brought two separate actions. *Phelps Realty Co. v. Bd. of Revision*[379] was a taxpayer complaint against the Hamilton County assessment upon the tax duplicate which was 4.22% higher than the statewide ratio. This action was filed pursuant to section 5715.19, Revised Code. *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals*,[380] decided the same day as *Phelps*, was an action in mandamus seeking a writ similar to that issued in the previous *Park Investment case*.

The *Phelps case* was appealing for two reasons. First, a judgment in favor of the taxpayer would have permitted him a substantial tax recovery and would have thereby partially compensated him for the costs of litigation. Second, the experience of the first *Park Investment case*, after which the Board of Tax Appeals seemed to ignore the necessarily broad writ of the Court, would have been avoided. The statute, however, only contemplates relief against a claimed "discriminatory valuation" where such valuation varies from "the common level of assessment of real property in the county for the year stated in the request." There is no statute which provides for such relief where valuation varies from the common level of assessment of real property in the state.

Thus, in order to correct an inexcusable error on the part of the Board of Tax Appeals, the Court was forced again to rely upon mandamus. Because of the decision in the *Phelps case*, there would be no relief for Park Investment Company against the county auditor, and therefore there was no adequate remedy at law.

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377 175 Ohio St. 410, 195 N.E.2d 908 (1964).

378 ". . . [I]n other words, the tax basis must be relatively uniform not only throughout the state but also as to the various classes of real property." *Id.* at 413, 195 N.E.2d at 909.

379 16 Ohio St. 2d 83, 243 N.E.2d 97 (1968).

380 16 Ohio St. 2d 85, 242 N.E.2d 887 (1968).

The choice of the Court was not without advantages. Allowing the recovery under section 5715.19, Revised Code, would discriminate in favor of taxpayers who had filed under a statute which was inapplicable on its face as against those who had not filed for relief. Further, this would have unsettled the collection of taxes on the current tax duplicates. And in prompting the Board of Tax Appeals to fix a uniform rate at the common state level of assessment, a decision in favor of the taxpayer in *Phelps* would have tended to reduce the common state level toward the lowest level in any county since every time relief would be given to an individual, the common level in his county would necessarily fall and the lower level in any one county would necessarily result in a lower common level throughout the state.

The Board is not obligated by the mandate to adopt the average level of assessment currently in effect in the state. This would deprive some of the more heavily populated counties of their anticipated revenues. Instead it could set the common and uniform percentage at the highest county's level. Contrary to many reservations which have been expressed on the effect of such an action, that increase would not levy more taxes than otherwise due to the automatic adjustment in rate of taxation applied to the altered valuation as provided in section 5713.11, Revised Code.

Following the decisions in these cases, and at the urging of the Board of Tax Appeals, a bill was introduced into the General Assembly to delay the effective date of the Court's writ.[381] The constitutionality of this legislative action as an interference with the Court's power to entertain original actions, and as a direct contravention of the Court's application of the Ohio Constitution, was bound to eventually become a hotly contested and interesting issue. In what was truly an inspired legal maneuver the Park Investment Company brought this appalling administrative and legislative abuse before the Court less than a week after the new law was signed by filing a motion for the Court to issue an order to the Board of Tax Appeals to show cause why it should not be held in contempt of the December writ of mandamus. The Court issued an order to show cause on June 6.

Property of a Railroad.—The preceding discussion noted that in 1964 the Court had determined that the statutory phrase "true value in money" referred to current market value of taxable property.[382] This term the Court had to interpret market value in the context of property taxation of a railroad and chapter 5727, Revised Code.

Based upon information supplied to the Tax Commissioner annually as stipulated and required in sections 5727.08 and 5727.09, Revised Code, he would make an arbitrary, cost-related adjustment to the previous year's

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[381] Amended S.B. 199. Signed by Governor Rhodes and effective the same day, May 14, 1969.

[382] State, *ex rel.* Park Investment Co., v. Board of Tax Appeals, 175 Ohio St. 410, 195 N.E.2d 908 (1964).

assessment to arrive at the taxable year's base figure. The adjustment formula has been used, with slight variations, for many years, and even the Tax Commissioner has been unable to authenticate its origin. Each year it has been customary for public utilities to appear before the commissioner, as authorized by section 5727.10, Revised Code, and in effect bargain for further adjustments. The consequence of this procedure, the Tax Commissioner urged, is an unchallengeable annual assessment: "the formula or formulae employed by the present and past Tax Commissioners to arrive at preliminary or tentative valuations each year were not prescribed by the legislature. But legislative prescription of such administrative detail is not necessary and neither this absence nor the absence of historical documentation of its evolutionary detail can invalidate the resulting valuations providing the resulting valuation is consistent with the law."

The attitude of the Court, evidenced in an opinion by Chief Justice Taft in *Pennsylvania R. Co. v. Porterfield*,[383] was that this method of assessment bore no necessary resemblance to actual value, and therefore it is impossible to conclude that the "resulting valuation is consistent with the law." The opinion noted that neither a book value as carried by the utility nor computed value based upon cost with fixed depreciation adjustments is a reliable estimate of market value, particularly in the case of a railroad. Essential to a valuation is at least a reference to the capitalization of the railroad, the market value of those securities, and the corporation's earnings. In saying this the Court did not reject the value of a formula, especially for arriving at an initial approximation, but it did say that the formula employed by the Tax Commissioner included irrelevant and insufficient variables.

Another basis for the Court's reversal was that, apparently by reason of the acquiesance of utilities in the past in the bargained tax valuations, the Tax Commissioner had formally avoided section 5727.11, Revised Code. That section required the commissioner to deduct from the over-all valuation the value of the railroad's real property, and to apply a rate of assessment to that property which was equal to that required for all other real property in the state.[384] There was no evidence that the Tax Commissioner had ever complied with that statute.

Evidence.—What was probably the most untenable contention of the term was offered in *Transport Motor Express, Inc. v. Porterfield*.[385] Each taxpayer subject to the highway use tax is required to maintain records of the movements of his vehicles over Ohio highways.[386] Transport Motor Express, a foreign carrier, had its corporate headquarters and relevant

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383 16 Ohio St. 2d 136, 243 N.E.2d 87 (1968).

384 *See* discussion *supra* at Section (N).

385 16 Ohio St. 2d 81, 242 N.E.2d 662 (1968).

386 OHIO REV. CODE ANN. § 5728.07 (Page 1953).

records in another state. Some drivers' logs were available for audit, and the tax examiners computed the total non-exempt miles which Transport's vehicles traveled from those. In cases where the logs were incomplete but there were references to succeeding locations of a vehicle, the examiner would infer that the vehicle had moved from the one location to the next over the shortest route. It is almost inconceivable that this sort of inference could prejudice the taxpayer in any instance, and in fact if any error could result in additional mileage this would be directly attributable to the taxpayer's own failure to maintain the records required by statute.

Nonetheless, Transport argued to the Court that section 5728.10, Revised Code, only authorized the commissioner to assess "upon any information in his possession," and the lack of recorded mileage was a lack of "information." This complaint did not impress the Court.

A question such as that presented in *Transport*, whether specific types of information constitute evidence which the Tax Commissioner and Board of Tax Appeals may consider, is purely one of law. A final resolution of that dispute, which will affect assessment procedures in many cases, is a valuable function of the Court. But where an appeal involves only the weighing of evidence, it is ridiculous for the court of highest jurisdiction to become involved.

The Court went out of its way to underline this attitude in the first syllabus paragraph of *Ace Steel Baling, Inc., v. Porterfield*.[387] The eagerness of the majority to assert that proposition is apparent from the fact that it is pure dicta. The Court having failed to rely upon the assertion of limited review beyond the Court of Appeals, and having willingly decided *Ace Steel Baling* itself as a question of law arising from a factual conclusion, it is likely that taxpayers will strain to present their factual disputes as legal questions until the Court finally denounces that formula by affirming the board in several close cases.

O. *Ohio Constitution*

Modern Courts Amendment.—It is fair to say that the decision of *Euclid v. Heaton*[388] on June 19, 1968 startled both professional and lay observers of Ohio government. In numerous newspapers editorial reactions approached indignation. The electors of Ohio were informed by the opinion of then newly titled Justice Schneider that the provisions of Amended Substitute House Joint Resolution No. 42 of the 107th General Assembly, proposing the "Modern Courts Amendment" to the Ohio Constitution which included an effective date of January 10, 1970, had become effective at the preceding election of May 7, 1968. This undoubt-

[387] 19 Ohio St. 2d 137, 249 N.E.2d 892 (1969).

[388] 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968).

edly came as a surprise to those electors who had troubled themselves to become informed of the text of the proposed amendment, and it was nothing short of a shock to those legislators who had participated in the drafting and passing of the much bargained-over resolution.

The Court, purporting to follow *State, ex rel. McNamara, v. Campbell*,[389] interpreted the syllabus in that case, which voided a delaying effective provision for a constitutional amendment because "the proposition to postpone the time named in the Constitution [was not] also submitted to the electors . . . ," to require that the summary ballot description[390] also contain the substance of the language of the delaying clause. Chief Justice Taft, in a separate opinion, vehemently disagreed with this theory. He cited other decisions of the Court reflecting on the insignificance of the specifics in a ballot condensation[391] and concluded that the amendment had to be either passed as proposed by the General Assembly or voided *in toto* due to an invalid submission of a misleading summary.

One prior commentator suggested that this decision "may present transitional problems."[392] These problems began to arise during the 1969 term.

Section (B) of the amendment's schedule provides that "[i]n accordance with the provisions of this article, the general assembly shall enact such laws and the supreme court shall promulgate such rules as will give effect to the provisions herein." The amendment itself, as well as the *Heaton* decision, provides that "[p]aragraph (B) of the Schedule . . . shall become effective immediately upon the adoption of this amendment by the electors of this state." Section 5 (B) of the Constitution, as enacted by the amendment, grants rule-making power to the Court to prescribe uniform "rules governing practice and procedure in all courts of the state." But Section 5(B) requires the Court to file its proposed rules "not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof," where any of them will be subject to legislative amendment or veto by concurrent resolution. The Court apparently caught its own rules advisory committee by surprise with its acceleration of the amendment's effective date, and it proved to be tactically unfeasible to promulgate rules for filing before January 15, 1969.[393] This may have avoided the embarrassment of the General Assembly notifying the Court that, despite the recent custom of annual sessions, the legislature is a bi-annual organization and the phrase "regular session" meant January of an even-numbered year. These various provisions, when read together, obviously intended to authorize the Court to

389 94 Ohio St. 403, 115 N.E. 29 (1916).

390 Required by OHIO REV. CODE ANN. § 3505.06 (Page 1960).

391 15 Ohio St. 2d at 79, 238 N.E.2d at 799.

392 Milligan, *supra*, note 4, at 820.

393 61 OHIO BAR 1570-71 (1968).

begin preparing rules during the interim period before the amendment's effective date so that they would be in final form for presentation by the Court to the General Assembly between the tenth and fifteenth days of January, 1970.

Another transitional problem created by the *Heaton* decision resulted from the legislature's loss of the two-year interim period in which it could have studied the practical difficulties the amendment would create. After the elimination of justices of the peace by the creation of County Courts in Ohio,[394] there remained Mayor's Courts in several Northeastern Ohio communities. Mayor's Courts have jurisdiction only over traffic cases, the mayor is not necessarily a member of the bar, and the courts are not courts of record. The judgments of Mayor's Courts, County Courts, and in some cases Municipal Courts were appealable to the Courts of Common Pleas. The new section 4(B), Article IV, of the Ohio Constitution now defines the jurisdiction of Courts of Common Pleas as original "over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." Thus, there is no longer any appellate jurisdiction in Courts of Common Pleas from lower courts. The commendable theory of the draftsmen of the amendment was that all first appeals should be to the several Courts of Appeals under section 3(B)(2), Article IV. Probably as an oversight the review is limited to the ". . . . judgments or final orders of the courts of record . . . ." The Mayor's Courts are the only trial bodies in Ohio which are not courts of record. Therefore, and this has been overlooked so far, there is no appeal as of right from a Mayor's Court judgment. The only apparent recourse would be a writ of prohibition. The General Assembly, when this anomaly is recognized, should eliminate the few Mayor's Courts which remain.

There is also the question of the retroactivity of *Heaton's* majority-of-the-Court rule on constitutional questions to pre-1968 cases. The delay of effective date would have mitigated the difficulties of injustice to a litigant since few cases decided by a Court of Appeals before the May, 1968 election would have come to the Court after January 10, 1970; those falling in the interim would be on notice of what to expect. Footnote 2 in Chief Justice Taft's opinion hints at the thought that earlier cases should be decided on the basis of section 2 of Article IV of the Ohio Constitution as in effect prior to the May 7 election. Justice Schneider attempted to thwart this suggestion by describing the former constitutional rule as "not procedural but organic, substantive law," and the language of the procedural savings clause in section (A) of the amendment's schedule would not require only prospective application.[395] The unsatisfactory aspect of this explanation is that if the former rule of review was "substantive" then

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[394] OHIO REV. CODE ANN. § 1907.011, effective June, 1957 (Page 1968).

[395] 15 Ohio St. 2d at 75, 238 N.E.2d at 796.

its amendment should not destroy the rights of parties which had accrued prior to the amendment's adoption. What is clear is that the Court did proceed to decide cases this term with the majority rule.

The question of effective date acceleration was specifically before the Court for the first time near the end of this term. *State, ex rel. Graves, v. Brown*[396] was an original action filed in the Court seeking a writ of prohibition to prevent a Municipal Court judge who was 70 years old from running for re-election. Section 6(C) of the amended Article IV of the Ohio Constitution forbids such a candidate to run for any judicial office. As one of the compromises to prevent hardship to elderly judges and to eliminate a block of solid and influential resistance within the judicial community, section (E) of the amendment's schedule made any such judge eligible for re-election in 1970, the year of the planned effective date.

The Court in *Graves* had to choose from four possible approaches. One was to apply the amendment as written: The "grandfather" clause applies only to judges running for re-election in the primary and general elections of 1970. This would have supported prohibition for the 1969 elections. A second approach could be to apply legislative purpose: No judge is disqualified for age until 1971 except those non-incumbents running in 1970. A third theory would protect those ten judges who were 70 or over and were nominated to succeed themselves at the same primary election in May, 1968 at which the amendment was submitted to the electors: The purpose of the draftsmen is construed to allow a one year savings clause from the effective date, and *Heaton* had the effect of commencing this year on May 7, 1968.[397] This approach would have created some ambiguities, however, since the May 6, 1969 primary would have been within the year while the November general election would not.[398] The *per curiam* opinion of the Court in allowing the writ in *Graves* may arguably have adopted the third theory or the first theory since the writ applied only to the 1969 primary election; without doubt the second theory was rejected. But the language of the Court seems clearly to represent a fourth and more absolute rule: The savings clause in section (E) of the schedule was "an attempt to postpone the effective date of a part of the constitutional amendment" and as such was totally ineffectual because not summarized on the ballot as required by *Heaton.* Four members of the

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[396] 18 Ohio St. 2d 61, 247 N.E.2d 463 (1969).

[397] Such judicial liberty could have been based upon language in State, *ex rel.* Duffy, v. Sweeney, 152 Ohio St. 308, 313, 89 N.E.2d 641, 644 (1949) as follows: ". . . a schedule, providing for the amendment becoming effective on the happening of some specific event, will not be interpreted as providing the only time for its becoming effective unless such a meaning is clearly expressed or necessarily inferrable from the words used."

[398] The reasoning of the Attorney General in his opinion supporting the November, 1968 election is open to question, but he achieves this result. OAG 68-110 (1968).

Court concurred, along with one Court of Appeals judge who was sitting by assignment for Chief Justice Taft.

One consequence of the *Graves* decision will be the disqualification from re-election in 1970 of approximately 65 judges of Ohio Courts of Common Pleas and Courts of Appeals. There are innumerable municipal judges affected in 1969 and 1970. An interesting factor is that the Court assumed without discussion that section 6(C) of Article IV applied to municipal judges. The language of that subsection commences: "No person shall be elected or appointed to any judicial office . . . ." This is broad and on its face all-inclusive, except when read in *pari materia* with subsections (A) and (B) where judges of the Courts of Common Pleas, Courts of Appeals and Supreme Court are referred to with no mention of municipal judges. The latter three courts have traditionally been known as "constitutional courts," while Municipal and County Courts are referred to as legislative courts, provided for by statute pursuant to sections 1 and 18 of Article IV. It was argued to the Court that the amendment of section 6 affected only the constitutional judges and was not intended to restrict the General Assembly's constitutional power to create inferior courts.

One ironic problem which faced the Court this term was the effect of the *Graves* decision on the validity of one of the Court's own mandates. In *Stillmaker v. Dept. of Liquor Control*[399] Judge Troop of the Court of Appeals for the Tenth Appellate District sat for Justice Herbert who had formerly been a member of the panel of the Court of Appeals which had decided the *Stillmaker case* below. Judge Troop was one of the four essential votes for reversing the judgment of the Court of Appeals.[400] As pointed out in a motion for rehearing, which was denied by the Court, Judge Troop was nominated for his current term on the Court of Appeals at the same primary election at which the Modern Courts Amendment passed while he was over 70 years of age, and he was subsequently elected at the next general election. Thus, the Court was forced to rely upon his vote as presumably only a *de facto* judge in order to achieve a constitutional majority for one of its own decisions.

The decisions in *Heaton* and *Graves* have raised another important inconsistency. Justice Schneider's discussion in *Heaton* referred favorably to sections (A) and (C) of the schedule as preserving procedural details for pending cases.[401] Yet following *Graves*, it is difficult to perceive how these savings clauses are any less attempts "to postpone the effective date of a part of the constitutional amendment," and as such they should be

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399 18 Ohio St. 2d 200, 249 N.E.2d 61 (1969).

400 OHIO CONST. art IV, § 2 (A).

401 15 Ohio St. 2d at 75-76, 238 N.E.2d at 796-797.

ineffective since they were eliminated in the ballot submission in exactly the same way as was section (E).

III. The Statistical Review

Tables I and II represent a compilation of the number of opinions published by the Court from January 1, 1965 to August 31, 1968 and September 1, 1968 to August 31, 1969, respectively. Table II is based upon the redefinition of the 1969 term which is used in this article.[402] This is the date sequence which applies to the subsequent tables. Table I has been produced to facilitate comparative analysis; while it might be theoretically desirable to compile statistics for this purpose over a longer period of time, the changes in the membership of the Court as a result of the November elections in 1964 make earlier data less valuable.

The technique used for compiling the information in Tables I and II is essentially that of counting. None of the information appearing in these, or any of the other tables could properly be considered confidential. The number and types of published opinions is readily available from the *Ohio State Reports*, and the other tables are similarly derived from the *Ohio Bar*, *Ohio Courts*, and the announcement sheets distributed to the public weekly by the Supreme Court Reporter.

Tables I and II present a rough approximation of the work load assigned to, or assumed by, each of the justices.[403] Although it is true that Chief Justice Taft and Justice Paul Herbert significantly out-distanced any of the other members of the Court, and each of them has written substantially more minority opinions than any other justice, it may be noted that they have both written more majority opinions than any other justice. Justice Schneider replaced the retiring Justice Herbert during the 1969 term as the second most prolific writer. It is also interesting to note that Chief Justice Taft has, in each of the years covered by Table I, written considerably more opinions than Chief Justice Warren of the United States Supreme Court.[404] Justices Zimmerman and Paul Herbert and Chief Justice Taft were absent from the Court due to illness for periods of 12, 3 and 3½ weeks, respectively, during the 1969 term.

The row in Tables I, II and III labeled "assigned" refers to those

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[402] Note† *supra.*

[403] Cases are assigned on the lot system to one of the justices tentatively voting in the majority, although a justice may volunteer for a particular opinion. Per Curiam opinions are similarly assigned, but a particular justice may choose, for various reasons, to convert a full opinion assigned to him into a *per curiam.* Of course, a particularly persuasive concurring or dissenting opinion might eventually be reported as a majority decision.

It might well prove to be a valuable tool for supervising the orderly disposition of opinions which have been assigned for the Chief Justice to assume the function of his counterpart on the Supreme Court of the United States; there the senior justice who is voting with the majority assigns the opinion.

[404] *See Five Year Table III*, 82 HARV. L. REV. 312 (1968). Concededly the opinions of the U. S. Supreme Court are considerably longer, a perhaps dubious honor.

Court of Appeals judges appointed to sit temporarily on the Supreme Court due to the illness, absence or disqualification of any justice. These judges are appointed as necessary by the Chief Justice.[405] It is apparent that these judges customarily vote with the majority and seldom write a dissenting opinion.

The information contained in Table III(A) is available only from the announcement sheets of the Court or the *Ohio Bar*. Dissenting votes recorded in the "announcement" column include those votes which are announced on merit dispositions that do not warrant a published opinion, as well as dismissals of claimed constitutional questions supporting appeals as of right on motion cases. These dismissals of claimed constitutional questions represent by far the majority of the dissenting votes recorded in that column. In effect, such a dissent is evidence of disagreement as to the composition of the case load which a majority of the Court has allowed.

Table III(B) is a conglomeration of the respective dissenting votes of the individual justices. This table shows the net result as to unanimity of the Court on announced decisions. Inevitably, the number of cases announced "with dissent" in Table III(B) will be less than the aggregate of total dissenting votes recorded in Table III(A), due to multiple dissents by several justices on a single case.

Table III(C) is well defined in the notes which accompany it. By dividing the figure in row "T" by those in row "N" it is possible to arrive at a percentage of voting agreement on merit cases with published opinions for each justice as compared to any other justice. The ratio thus derived provides what might be called an index of judicial philosophy.

Table IV attempts to construct a more meaningful record of docket progress than that which is currently compiled by the Supreme Court and published in an annual January summary of *Ohio Courts*. Failure of the Court to distinguish in its statistics between appeals, according to the method of origination in the Court, prevents a breakdown of the total figure for appeals pending on September 1, 1968. Similarly, the remote possibility that some of those cases which had been pending on September 1 remained on the docket on August 31, 1969 prevents a confident breakdown in the last column.

Those motions allowed, as indicated in Table IV(B), are recorded as "filed" in the appropriate categories of Table IV(A). This is a reflection of the fact that such cases are actually heard twice by the Court, although, since the amendment of the Court rules of practice announced in October, 1969, the first "hearing" on the motion itself will customarily be on briefs alone without oral argument. Applications for rehearing, reviewed in Table IV(C), appear nowhere else in these statistics. The statistics relating to disciplinary cases, recorded in Table IV(D), although they are considered

[405] OHIO CONST. art. IV, § 2 (A).

dispositions on the merits by the Court, are not included in Table IV(A), nor in the subject matter categories of Table V. They are incorporated, where appropriate, in Tables I, II and III. The only other reference to disciplinary dispositions is found in Table VI which presents the types of discipline recommended and imposed, and the frequency of each during the past term.

Table V serves a double function, that of presenting a general subject matter distribution of the cases filed in the Court and of those which are ultimately decided on the merits, and that of a comparison of the number of instances of affirmance and reversal of those merit cases decided during the term. As to any subject matter classification, it is possible to obtain some perspective on the importance attributed to it by the Court. Motions which are allowed depend upon the presentation of a substantial constitutional question[406] or an issue of public or great general interest.[407] Although all motions allowed during the term are not disposed of on the merits during that same term, and some merit dispositions are of cases allowed on motion during the previous term, it should be reasonable to compare in a gross sense the number of cases in Table V within a subject category which are decided on the merits after a motion is allowed to the number of cases in that same category which are overruled during the term. This will suggest which categories the Court recognizes to present relatively more interesting or constitutional issues.

One of the more striking statistics to be found in this table is the comparison of the affirmed and reversed merit cases which are heard after a motion has been allowed as opposed to the proportion of affirmance and reversal on other merit appeals. It is obvious that, when the Court accepts a motion to be heard on the merits, it anticipates both a question of legal significance and a probability of error in one of the lower courts. Thus, the reversals outnumber the instances of affirmance, in total as well as within most subject categories. However, the reverse situation prevails for other appeals, for here the Court is directed to hear these cases on the merits in all instances. Cases from the Board of Tax Appeals are among the most frequent categories of constitutionally permissible[408] and statutorily provided[409] appeals. There is dual appellate jurisdiction from the Board of Tax Appeals in the Supreme Court and in the Courts of Appeals; unfortunately, the choice of forum is left to the appellant, and many cases are brought to the Court involving little more than reconsiderations of factual disputes. This the Court has declined to do, as a general matter,[410]

406 OHIO CONST. art. IV, § 2 (B) (2) (a) (iii).

407 OHIO CONST. art. IV, § 2 (B) (2) (d).

408 OHIO CONST. art. IV, § 2 (B) (2) (c).

409 OHIO REV. CODE ANN. § 5717.04 (Page 1953).

410 *Compare* Bd. of Revision v. Federal Reserve Bank, 16 Ohio St. 2d 42, 242 N.E.2d 571 (1968), *with* Pennsylvania Rd. Co. v. Porterfield, 16 Ohio St. 2d 136, 243 N.E.2d 87 (1968).

and in such a case it will ordinarily affirm. A far more reasonable statutory scheme would be to require the first appeal as of right from the board to the Court of Appeals, and to have those decisions reviewed only upon the allowance of a motion to certify.

Another noteworthy statistic is the large number of criminal cases overruled on motion. At least in part this is attributable to the negligence of this author in failing to construct subcategories that would distinguish procedure, evidence, various constitutional complaints and the other niceties of criminal law. In defense it may be said that almost every case raised several issues, and since most cases were not discussed on the merits by the Court it was impossible to choose the most significant error alleged. In sum, such an attempt would have been unduly misleading. But it may also be pointed out that this category as a whole probably reveals the Court's current attitude on criminal appeals. There are, I believe, at least four factors influencing the apparent reluctance to allow motions for leave to appeal: (1) the feeling that the Supreme Court of the United States has usurped the authority to supervise criminal practice and with it the responsibility,[411] (2) an increasing awareness by the lower courts of the requirements of criminal due process and a consequently more conscientious effort to conform to those requirements, (3) a continuing failure on the part of counsel to create a reviewable record including an adequate bill of exceptions,[412] and (4) the transfer of post-conviction review to the lower courts[413] together with holdings that some complaints of error may be lost.[414]

The column on "original actions" does not include rulings on demurrers which are not agreed by the parties to be dispositive of the case. Since the establishment of Ohio's post-conviction review procedure,[415] many original actions brought by criminal defendants are inappropriate. In such cases it is normal for the State to demur, and it is also normal for the prisoner-appellant to decline to agree that the ruling on the demurrer will be dispositive; in actuality, the waste of his time is no loss to him, and if a demurrer is sustained he does not desire that this shall terminate his legal proceedings.

Table V is concerned only with final dispositions. Thus, it does not

The former case was a waste of the Court's time, and the latter would have undoubtedly been allowed as a motion because of the serious statutory and constitutional questions presented. *See* discussion at section II(N), *supra.*

411 *See* two articles by Chief Justice Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815 (1964), and Book Review, *Search and Seizure and the Supreme Court*, 42 NOTRE DAME LAW. 589 (1967).

412 *See, e.g.*, cases 68-58 through 68-63, dismissed as improvidently allowed on October 30, 1968.

413 OHIO REV. CODE ANN. § 2953.21 (Page 1953). *See* Freeman v. Maxwell, Warden, 4 Ohio St. 2d 4, 210 N.E.2d 885 (1965).

414 State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967).

415 See note 411 *supra.*

include cases which are dismissed for want of prosecution, upon the application of appellant or upon agreement of the parties, motions to file delayed appeals which are overruled, or cases dismissed as moot. All of these types of dispositions represent cases which, for practical purposes, are not before the Court and are not considered by it. But to accurately present the progress of the docket, even these cases are accounted for in Table IV(A) as "disposed of" or in Table IV(B) as "overruled."

Table VII shows the original county and appellate district of each appeal filed in the Court. Each case filed as a motion is recorded again if the motion is allowed. Therefore, the merit column will include allowed motions and other appeals in cases which originate in a lower court.

TABLE I
PUBLISHED OPINIONS
January 1, 1965[a] - August 31, 1968

		1965	*1966*	*1967*	*1/1-8/31/68*[b]	*Sub Total*	*Total Opinions*
Taft	Majority	13	13	21	18	65	
	Minority[c]	9	15	7	14	45	110
Zimmerman	Majority	11	10	12	11	44	
	Minority	3	4	0	4	11	55
Matthias	Majority	11	12	13	17	53	
	Minority	1	1	1	2	5	58
O'Neill	Majority	13	13	13	13	52	
	Minority	9	3	3	2	17	69
Herbert	Majority	16	13	11	16	56	
	Minority	11	9	7	9	36	92
Schneider	Majority	12	12	11	14	49	
	Minority	5	9	2	7	23	72
Brown	Majority	12	9	8	9	38	
	Minority	1	5	3	2	11	49
Assigned	Majority	4	3	3	0	10	
	Minority	1	0	1	1	3	13
Total Signed	Majority	92	85	92	98		367
Total Signed	Minority	40	46	24	41		151
Total Signed Opinions		132	131	116	139		518
Per Curiam		63[d]	58	62	55		238
Total Opinions		195	189	178	194		756

a This is the date of the commencement of the terms of Schneider, J., and Brown, J.

b Including Casualty Co. v. Gall, 15 Ohio St. 2d 261 (1968), heard during previous term.

c Includes both concurring and dissenting opinions.

d Not including 64 original habeas corpus actions.

TABLE II
PUBLISHED OPINIONS[a]
September 1, 1968 - August 31, 1969

	Majority[b]	*Concurring*	*Dissenting*[c]	*Total*
Taft	15	2	3	20
Zimmerman	5			5
Matthias	8			8
O'Neill	8		1	9
Herbert (Paul)[d]	1		4	5
Schneider	13	1	4	18
Brown[e]	3		1	4
Herbert (Thomas)[f]	6			6
Duncan[g]	8		3	11
Assigned	7			7
Per Curiam	55			55
Total	129	3	16	148

a Not including brief elaborations of dissent or concurrence.
b Includes one election contest heard by Chief Justice only.
c Includes opinions in which dissenting in part and concurring in part.
d Term ending January 1, 1969.
e Resigned effective January 1, 1969.
f Term commencing January 2, 1969.
g Appointed effective January 7, 1969.

TABLE III
ACTION OF INDIVIDUAL JUSTICES
(A) DISSENTING VOTES[a, b]
In Dispositions by

	Published Opinion	*Announcement*	*Total*
Taft	7	10	17
Zimmerman	4	7	11
Matthias	7	7	14
O'Neill	4	12	16
Herbert (Paul)	11	6	17
Schneider	10	35	45
Brown	6	7	13
Herbert (Thomas)		5	5
Duncan	10	16	26
Assigned	2	3	5
Total	61	108	169

a. Includes express dissent and silent vote when not otherwise indicating Justice not participating on a motion or merit announcement, but only an express dissent on a published opinion.
b. Multiple case numbers with single opinion or announced vote counted once for each case number.

(B)[a]

	Unanimous	*With Dissent*	*Total*
Published Opinions[b]	95 70%	40 30%	135
Merit Cases and Motions with Announced Vote[c]	197 73.5%	71 26.5%	268
Total	292 72.5%	111 27.5%	403

a. Footnote *a* to Section (A) applies.

b. Multiple case numbers with one opinion counted once.

c. Multiple case numbers with single announced vote counted once for each case number.

(C) Votes of Each Justice with Another[a]

		DUNCAN	HERBERT (Thomas)	BROWN	SCHNEIDER	HERBERT (Paul)	O'NEILL	MATTHIAS	ZIMMERMAN
Taft	M[b]	61	54	27	90	12	102	105	68
	S[c]				2		1	2	1
	T[d]	61	54	27	92	12	103	107	69
	N[e]	76	63	37	111	23	120	122	79
Zimmerman	M	32	26	30	61	15	73	74	
	S								
	T	32	26	30	61	15	73	74	
	N	37	31	36	75	23	82	82	
Matthias	M	69	63	32	99	13	111		
	S	1							
	T	70	63	32	99	13	111		
	N	86	71	37	122	24	128		
O'Neill	M	67	60	31	98	15			
	S	1		1	2	1			
	T	68	60	32	100	16			
	N	83	69	38	119	24			
Herbert (Paul)	M			9	9				
	S			1	1				
	T			10	10				
	N			21	21				
Schneider	M	60	55	24					
	S		1	2					
	T	60	56	26					
	N	79	64	34					
Herbert (Thomas)	M	57							
	S								
	T	57							
	N	71							

a. The cases are limited to those on the merits with published opinions, either signed or *per curiam*.

b. Represents majority opinions of the court, either signed or *per curiam*, in which a justice concurs generally.

c. Represents separate opinions, of any length, either concurring or dissenting. Also includes similar votes dissenting or concurring with reservations.

d. Total agreements in "M" and "S".

e. Represents number of cases in which both Justices participated, and therefore the total opportunities on the merits for expressed agreement.

TABLE IV
DISPOSITION OF CASES

(A) Disposition of Cases on the Merits

	Pending 9/1/68	*Filed*[a]	*Disposed of*	*Remaining on Docket 8/31/69*
Original Actions				
Habeas Corpus	2	24	16	10
Other	14	40	33	21
Total	16	64	49	31
Appeals				
Certified on Conflict by Courts of Appeals		8	8	
Death Cases		3	7	
Cases originating in Court of Appeals		31	24	
From Board of Tax Appeals		38	49[b]	
From Public Utilities Commission		2	8	
Jurisdiction Determined on Motions to Certify and Claimed Appeals as of Right on Constitutional Questions in Civil Cases.		414	390	
Jurisdiction Determined on Motions for Leave to Appeal and Claimed Appeals as of Right on Constitutional Questions in Criminal Cases.		218	183	
Total	113	714	669	158

a. Includes motions on which jurisdiction determined during term.

b. Includes 23 consolidated cases involving the distribution of the Cuyahoga County local government fund, Brook Park v. Budget Comm., 16 Ohio St. 2d 119 (1968).

(B) Disposition of Cases Where Memoranda In Support of Jurisdiction Required

	Pending 9/1/68	*Filed*	*Allowed*	*Overruled**	*Pending 8/31/69*
Motions to Certify and Claimed Appeals as of Right on Constitutional Questions in Civil Cases		414	74	316	
Motions for Leave to Appeal and Claimed Appeals as of Right on Constitutional Questions in Criminal Cases		218	9	174	
Total	248	632	83	490	307

* Also includes a dismissal of a case upon motion to dismiss, for want of prosecution, upon application of appellant, or upon agreement of the parties.

(C) Applications for Rehearing

Pending 9/1/68	*Filed*	*Allowed*	*Overruled*	*Pending 8/31/69*
1	55	0	56	0

(D) Disciplinary Cases

Pending 9/1/68	*Filed**	*Disposed of*	*Pending 8/31/69*
6	8	8	6

* Includes 4 petitions for reinstatement recorded under case number of previously disposed cases.

TABLE V

SUBJECT MATTER OF FINAL DISPOSITIONS[a]

	MOTIONS OVERRULED[b]	ON MERITS					TOTAL
		After Motion	*Allowed*[c]	*Other Appeal*		*Original*	
		Affirm	*Reverse*[e]	*Affirm*[d]	*Reverse*[e]	*Actions*[f]	
Adoption	2						2
Annexation	2	1	1				4
Appeals	23						23
Appropriation	6	4	2	2			14
Assessments	1		1				2
Bastardy	2						2
Charties			1	1			2
Commercial Transactions	7						7
Contractors	3						3
Contracts	8	2	1				11
Corporations	3						3

Criminal Law	150	5	6	3	4	16	184
Custody	2			1			3
Damages	5						5
Divorce and Alimony	12						12
Elections	7				1	9	17
Estates and Wills	15	1	6				22
Foreclosure	2						2
Government		1	1			1	3
Injunction	3			1			4
Insurance	17		1				18
Jurisdiction	3	1	3	1			8
Juvenile Court	4		1			1	6
Labor	7						7
Landlord-Tenant	2						2
Libel	2						2
Minors	2		2				4
Motor Vehicles	16	1	1				18
Municipal Government	6	1	3	1			11
Negligence	23	1	4				28
Officials, Boards and Commissions	17		3		2	3	25
Public Employees	1			1			2
Public Utilities				2	4		6
Real Property	15		2				17
Taxation	7			9	9[g]	1	26
Trade Names	2						2
Trial Practice	59		4			3	66
Trusts	3	1					4
Workmen's Compensation	11	1	1	5	4		22
Zoning	9	1	1				11
Total	459	21	45	27	24	34	610

a. Many category assignments are arbitrary; for example, in a given case the distinction between "annexation" and "elections" may be difficult. Choices are made on the basis of the principal issue in each case. The "Motions" tabulated above do not include: those cases dismissed for want of prosecution, upon application of appellant, or upon agreement of the parties; those cases on the disciplinary docket; motions to file delayed appeal which are overruled; cases dismissed as moot; or motions for rehearing.

b. Includes motions allowed and subsequently dismissed as improvidently allowed. Motions allowed will appear as final dispositions when decided on the merits. Also includes motions to dismiss an appeal which are sustained.

c. Does not include those cases dismissed as improvidently allowed.

d. Includes modified judgments, and includes dismissals upon motion to dismiss.

e. Includes affirmed in part and reversed in part.

f. Does not include rulings on demurrer which are not agreed to be dispositive.

g. 23 consolidated cases counted only once. See Table IV(A), note b, *supra.* Also, consolidated cases numbers 68-672 through 676, 68-694, and 68-696 counted only once.

TABLE VI
DISCIPLINARY DISPOSITIONS[a]

Recommended Discipline by Board of Commissioners on Grievances and Discipline	*Judgment of Court*						
	No Action[b]	Private Reprimand	Public Reprimand	Indefinite Suspension	Disbarment	Reinstatement	Total
No Action[b]	1						1
Private Reprimand		0					0
Public Reprimand			3				3
Indefinite Suspension			2	1			3
Disbarment					0		0
Reinstatement						1	1
Total	1	0	5	1	0	1	8

a. Does not include motions for reconsideration or to remand to Board of Commissioners.
b. Includes both no orginal discipline and denial of petition for reinstatement.

TABLE VII
APPEALS FILED

COUNTY	*APPELLATE DISTRICT*	*MERIT CASES*[a]	*MOTIONS*
Butler	1	0	8
Clermont		1	5
Clinton		0	0
Hamilton		18	87
Warren		0	1
Total		19	101
Champaign	2	0	1
Clark		1	1
Darke		0	0
Fayette		0	1
Greene		0	3
Madison		0	4
Miami		1	0
Montgomery		0	18
Preble		0	0
Shelby		0	0
Total		2	28

Allen	3	0	7
Auglaize		1	2
Crawford		0	1
Defiance		1	2
Hancock		0	2
Hardin		0	0
Henry		0	0
Logan		0	0
Marion		2	4
Mercer		0	0
Paulding		0	1
Putnam		0	0
Seneca		0	0
Union		0	1
Van Wert		0	0
Wyandot		0	0
Total		4	20

APPEALS FILED

COUNTY	*APPELLATE DISTRICT*	*MERIT CASES*[a]	*MOTIONS*
Adams	4	2	3
Athens		2	4
Brown		0	0
Gallia		0	0
Highland		0	0
Hocking		0	2
Jackson		0	1
Lawrence		0	1
Meigs		0	0
Pickaway		0	3
Pike		0	0
Ross		1	2
Scioto		0	1
Vinton		0	0
Washington		1	5
Total		6	22
Ashland	5	0	4
Coschocton		0	2
Delaware		0	3
Fairfield		2	4
Guernsey		1	2
Holmes		0	0
Knox		0	3
Licking		0	0
Morgan		0	1
Morrow		1	1
Muskingum		0	2
Perry		0	0
Richland		3	11
Stark		3	21
Tuscarawas		1	4
Total		11	58

Erie	6	0	6
Fulton		0	0
Huron		1	3
Lucas		4	41
Ottawa		2	4
Sandusky		2	2
Williams		0	0
Wood		3	7
Total		12	63

APPEALS FILED

COUNTY	*APPELLATE DISTRICT*	*MERIT CASES*[a]	*MOTIONS*
Belmont	7	0	3
Carroll		0	0
Columbiana		1	0
Harrison		0	1
Jefferson		0	2
Mahoning		4	16
Monroe		0	2
Noble		0	0
Total		5	28
Cuyahoga	8	9	109
Lorain	9	1	12
Medina		0	2
Summit		4	60
Wayne		1	0
Total		6	74
Franklin	10	13	90
Ashtabula	11	0	3
Geauga		2	6
Lake		1	19
Portage		2	5
Trumbull		0	8
Total		5	41

a This column does not include habeas corpus and other original actions, appeals from the Board of Tax Appeals, or appeals from the Public Utilities Commission.